

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

BARBARA H. LEE, et al.

v.

VIRGINIA STATE BOARD OF ELECTIONS,
et al.

Civil Action No.
3:15 CV 357

February 25, 2016

COMPLETE TRANSCRIPT OF BENCH TRIAL
BEFORE THE HONORABLE HENRY E. HUDSON
UNITED STATES DISTRICT COURT JUDGE

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892

	E X A M I N A T I O N S				
	DIRECT	CROSS	REDIRECT	RECROSS	
3	Dr. Minnите	---	---	894	---
4	Myron McClees	919	987	997	---
5	Matthew Davis	999	1027	1049	---
6	Rebecca Slutsky	1052	1062	-----	-----
7	Dr. Lichtman	1078			
8					
9					
10					
11					
12					
13					
14					
15					
16					
17					
18					
19					
20					
21					
22					
23					
24					
25					

REDIRECT-EXAMINATION OF DR. MINNITE

893

1 (The proceeding commenced at 8:51 a.m.)

2 (Krista Harding is now the court reporter.)

3 THE COURT: Good morning.

4 MR. SPIVA: Good morning.

5 MR. HEARNE: Good morning.

6 THE COURT: We resume this morning with the redirect
7 examination of Dr. Minnите. Doctor, if you'd resume the
8 seat on the witness stand, ma'am.

9 One other bit of housekeeping. I'm going to begin
10 tomorrow morning at 9:30 and recess at 4:00. Over the
11 course of the week, a lot of things have been accumulating
12 in my in-box I've got to address before the end of the
13 week. So I hope that doesn't inconvenience you-all too
14 much.

15 MR. KAUL: We will appreciate the extra half hour of
16 sleep, Your Honor.

17 THE COURT: I didn't think you-all would mind when I
18 thought of that.

19 MR. KAUL: I think I speak for everybody on both
20 teams.

21 THE COURT: Go right ahead with your examination of
22 the Doctor.

23 MR. KAUL: Thank you, Your Honor.

24 **REDIRECT EXAMINATION**

25 BY MR. KAUL:

REDIRECT-EXAMINATION OF DR. MINNITE

894

1 Q Dr. Minnите, I just want to briefly touch on two of
2 the topics that you and Mr. Hearne discussed a moment ago
3 -- a day ago. Let me start with this one.

4 You were asked some questions about the form of ID
5 required for HAVA. Do you recall that?

6 A Yes.

7 Q And I believe you were asked about whether if HAVA
8 were not in place, a person could go to the polls and
9 register without ever showing identification and vote
10 without showing identification. Do you recall that
11 hypothetical?

12 A Yes.

13 Q Now, HAVA was in place prior to either of the voter
14 identification requirements being passed in Virginia, is
15 that right?

16 A Yes.

17 Q Okay. So when HAVA was in place, was there a system
18 for identifying a registrant? And this is before the
19 voter ID laws, I'm talking now. Was there a system in
20 place for confirming the identity of a registrant, even if
21 the registrant didn't register in person?

22 THE COURT: Are you talking about in Virginia or
23 nationwide?

24 MR. KAUL: Virginia.

25 THE COURT: Okay.

REDIRECT-EXAMINATION OF DR. MINNITE

895

1 A Yes.

2 Q And can you just explain how that works?

3 A Well, Virginia had an identification requirement --
4 are you talking about after they've registered or before
5 they've registered?

6 Q I'm talking about sort of how it worked for HAVA
7 registrants before the voter ID laws were in place.

8 A Okay.

9 Q Let me back up a step. My question wasn't clear.

10 A No.

11 Q So when people would register prior to the voter ID
12 law, they were either subject to the HAVA identification
13 requirements or not, right?

14 A Right. I mean, HAVA was passed in 2002.

15 Q Yes.

16 A And Virginia already had an identification law. I
17 believe it was passed in 1996.

18 Q Okay.

19 A That was in place until 2012. So, are you talking
20 about the period between 2002 and 2012?

21 Q Yes. I'm sorry. That is what I was aiming for.

22 A Okay. So a person who registered to vote in Virginia
23 between 2002 and 2012 would supply their social security
24 number on the registration application. And then going --
25 they would go to the polls, and they would be subjected to

REDIRECT-EXAMINATION OF DR. MINNITE

896

1 the existing law that was in place from 1996, which
2 allowed them to show a voter registration card, a social
3 security card, a driver's license, a government-issued
4 identification, or they could, if they didn't have that,
5 they could attest to their identity.

6 Q And what if a voter who registered did not provide
7 their social security number?

8 A I'm not sure what -- I don't know that I remember
9 what the rules were for that.

10 Q Were there certain voters who had to provide a form
11 of identification at the polls under HAVA?

12 A Yes.

13 Q And who were those voters?

14 A Well, they would be the ones who were registering in
15 a jurisdiction and voting for the first time in that
16 jurisdiction if they had registered by mail.

17 Q So anybody who was showing up at the polls who had
18 already registered by either providing their social
19 security number or providing an identity at the polls, or
20 having previously registered in Virginia?

21 A Yes.

22 Q And you were asked about some statements that Senator
23 Bond made regarding HAVA. And you mentioned that you had
24 done a case study of that in your book?

25 A Yes.

REDIRECT-EXAMINATION OF DR. MINNITE

897

1 Q What did you find in your in-depth study of that
2 situation that you were referring to yesterday?

3 A Well, I guess, as I described yesterday, the passage
4 of the bill took a while. And it had to go through the
5 House, had to go through the Senate. There were hearings,
6 and so forth. And it was when the conference committee
7 was put together, and Senator Bond was in that, was part
8 of that, that the identification requirement got put back
9 in.

10 So, in other words, once the conference version of
11 the bill came out, both the House and the Senate then have
12 to repass that bill, and it had the section -- again, I
13 think it was 301(b) in it, which is this HAVA requirement
14 that we've been discussing.

15 That wasn't in the bill when it went into conference.
16 When it came out of conference it was there. And Senator
17 Bond was on the conference committee, and it was his
18 strong belief that it should be there.

19 Q Okay. So that wasn't something that was passed by an
20 amendment in either of the Houses? It came out of
21 conference?

22 A That's right.

23 Q And then the full bill was passed?

24 A Right.

25 Q You were asked about some newspaper articles

REDIRECT-EXAMINATION OF DR. MINNITE

898

1 yesterday. Do you recall that?

2 A Yes.

3 Q And some of them relate to St. Louis. Do you recall
4 that?

5 A Yes.

6 Q Is that a topic that you, in the course of your
7 research, have studied in-depth?

8 A Yes.

9 Q And so the article that you were shown, at what stage
10 in the sort of process of those allegations did that
11 article come out, if you know?

12 A It came out at the -- in a sense, at the beginning,
13 were there had been this incident of voter registration
14 applications that were collected by a voter registration
15 drive being kind of, you know, given to the Board of
16 Elections on the last day. And I think there were
17 something like 1,200 or 1,500 of them that were submitted
18 by the group. It was called Operation Big Vote. It was
19 submitted by them on the last day.

20 And there was some flagrant fake registration cards
21 in there. My recollection is that someone on the -- one
22 of the workers at the Board of Elections recognized, you
23 know, her dead mother. And then there was the famous case
24 of the very well known alderman in St. Louis who had been
25 dead since 1990. His name was on one of the applications.

REDIRECT-EXAMINATION OF DR. MINNITE

899

1 So it was immediately recognized as problematic. And
2 there was an investigation.

3 And I believe that article, I don't recall exactly
4 the date of the article, but it was talking about this
5 problem that had happened where there were these fake
6 cards that were submitted.

7 Q So you said there was an investigation conducted?

8 A This was a grand jury investigation into it. The
9 woman who was the supervisor of the organization that
10 collected these registration applications actually was --
11 ended up being convicted of perjury to the grand jury
12 because she told the grand jury she didn't have any way of
13 keeping control of the people who were working for her, or
14 tracking the cards. And she was bound to turn them in.

15 And I think there was testimony by somebody else who
16 contradicted that and said, no, there was a meeting. They
17 had copies of the cards. She could have figured it out.
18 She wasn't convicted of fraud. She was convicted of
19 perjury. And she had a suspended sentence for it.

20 I think there were five or six of the workers who
21 collected the cards who admitted that they put fake names
22 on them who were convicted as well.

23 Q Okay. So this is the case where there clearly was
24 prosecutorial interest in bringing charges, right?

25 A Oh, yes.

REDIRECT-EXAMINATION OF DR. MINNITE 900

1 Q Was there any voter impersonation found in that
2 investigation?

3 A Not to my recollection. I mean, those people didn't
4 get registered. I think they flagged, you know, like a
5 third of all the cards that had been turned in as just
6 flagrant -- you know, going through a phone book, and the
7 handwriting is all the same, and so forth. So it was easy
8 to catch by the election workers.

9 Q So this is something that election workers caught in
10 the ordinary course?

11 A Yes.

12 Q Was the -- well, what was the motive for the people
13 who filled out the false registration?

14 THE COURT: How would she know what someone else is
15 thinking about?

16 BY MR. KAUL:

17 Q Were there statements made about why the people who
18 filled out the registrations?

19 A No. I mean, what was reported was that this
20 organization wasn't affiliated with any candidate. But
21 there was a sort of tense competition. It was a
22 Democratic primary. There was a competition between two
23 candidates, and I think somebody was trying to come back
24 into office and to challenge.

25 Even though that was going on, this wasn't an

REDIRECT-EXAMINATION OF DR. MINNITE

901

1 operation related to those candidates, and therefore there
2 was even less of an incentive to make sure that what they
3 were doing was correct. It was just one of the women who
4 was convicted of the fake cards was also convicted of
5 possession of crack cocaine. So there were problems with
6 the people who were collecting the cards, and no showing
7 of like a conspiracy on the part of one of the candidates
8 to commit the fraud.

9 Q Was there any indication that these were being filled
10 out so that individuals could go and vote in the names of
11 those registrations?

12 A No.

13 Q And is this something that you recall -- recount
14 in-depth in your book?

15 A I don't actually talk about that story, but I was
16 tracking it. You know, all my files on the case, I was
17 tracking that story because the conviction came a little
18 bit later. This actually was -- that was the 2001 mayoral
19 primary that happens in the spring, and my case was on the
20 2000 presidential election in the previous November. But
21 I was very aware of it. I didn't quite remember it when
22 the article came on on my screen here.

23 Q So is this something that was accounted for in your
24 overall findings and conclusions in the work you've done?

25 A Yes.

REDIRECT-EXAMINATION OF DR. MINNITE

902

1 Q Going back to the false voter registration issue. In
2 your, I guess, 15 years or so of study of this issue, are
3 you aware of any case ever in which a registration was
4 submitted in a fake name, and a voter then used that
5 registration and cast a ballot?

6 A No.

7 THE COURT: I assume you're talking about whether or
8 not that resulted in a charge or conviction?

9 MR. KAUL: I'm asking if she has any knowledge of any
10 context.

11 THE COURT: All right. That's fine.

12 A No.

13 Q You were asked about a news article from Milwaukee.
14 Do you recall that?

15 A Vaguely.

16 Q Let me just ask you briefly about Milwaukee. Is that
17 another issue that you studied in-depth?

18 A Yes.

19 Q And I think you said on cross-examination that you
20 actually talked to the U.S. Attorney?

21 A Yes. I interviewed the U.S. Attorney.

22 Q And this was during the Bush Administration when
23 there was an emphasis on prosecuting fraud cases?

24 A That's correct.

25 Q Did -- and can you explain sort of what was going on

REDIRECT-EXAMINATION OF DR. MINNITE

903

1 with that, the investigation in Milwaukee, at that time?

2 A Well, as I was talking about yesterday, the Milwaukee
3 Journal Sentinel really focused like a laser on the
4 problems in Milwaukee. There were problems both in 2000,
5 and then in 2004. And the county DA wanted to try to
6 prevent some of the problems they had in 2000, so he
7 approached the U.S. Attorney, the police department in
8 Milwaukee, and they said, well, let's put a task force
9 together to monitor, be aware of, what's going on.

10 And after the 2004 election, they followed up on a
11 lot of the irregularities that had been uncovered and
12 reported on by the Milwaukee Journal Sentinel. Some of
13 them were things I've mentioned, like the newspaper got a
14 hold of the poll log books, and they looked at the number
15 of people who were signing in, and they looked at the
16 number of ballots. And there were cases where they didn't
17 match. There were same-day registration applications
18 where the required follow-up hadn't been done. And there
19 was a kind of, you know, massive dysfunction in the
20 Milwaukee Board of Elections.

21 And when I interviewed the U.S. Attorney, he had
22 brought more cases in a single place than almost anybody
23 else as a U.S. Attorney. He focused on trying to
24 prosecute voter fraud. And I said, well -- I think he had
25 charged 14 people. There were 10 who were charged because

REDIRECT-EXAMINATION OF DR. MINNITE

904

1 they had felony convictions, and there were four who were
2 charged as double voters. But he didn't have a very high
3 conviction rate. I don't recall exactly, but there were,
4 you know, maybe half of them were -- either pled guilty or
5 were convicted.

6 I told him that I had talked to defense lawyers in
7 Milwaukee who all said to me "*We've never seen the federal*
8 *government do something like this before.*" All of these
9 people are indigent. All but one was African-American.
10 They had never seen the federal government go after people
11 for this charge. You know, bringing the full weight of
12 the federal government against these people. What's going
13 on?

14 So I said to him, "*This is what they say to me.*"
15 "*What do you say to that?*"

16 He said, "*We didn't*" -- and he said this publically
17 as well. "*We didn't find any conspiracy to try to*
18 *manipulate the election. In the end, we didn't even*
19 *finish our report, our task force report, because there*
20 *were some problems, administrative problems. We could not*
21 *prove that people did this deliberately. There were*
22 *better explanations for those irregularities.*"

23 So that was the outcome. And the report that a lot
24 of people cite, which was the preliminary findings, which
25 was actually leaked many years -- several years after the

REDIRECT-EXAMINATION OF DR. MINNITE

905

1 fact, that was something that the -- when it was leaked by
2 somebody who worked on it, that was when the police chief
3 came out and he was very unhappy that it had been leaked.

4 There was no final report. I kept following up. I
5 had interviewed the director -- the Executive Director of
6 the Election Board. And I kept following up with her.
7 When are they going to come out with their final report?

8 And there was no final report because there was
9 nothing -- they sort of abandoned it, I would say, from my
10 point of view. They abandoned it because they just
11 decided that the real problems were with the election
12 administration, and not a problem with criminality and
13 fraud.

14 Q And just to sort of summarize, this was an intensive
15 investigation into fraud in Milwaukee?

16 A Yes.

17 Q And how many cases of voter impersonation were
18 charged?

19 A None.

20 Q All right. Was that case study accounted for in the
21 work that you've done over the years?

22 A Yes.

23 Q And then I want to ask you about the last point that
24 he asked about, which is in Washington, in the State of
25 Washington, during the year where there was a recount. Do

REDIRECT-EXAMINATION OF DR. MINNITE

906

1 you recall that?

2 A Yes.

3 Q And just briefly, you probably learned a lot about
4 recounts in examining this, right?

5 A Yes.

6 Q And in recounts, literally, the lawyers go ballot by
7 ballot arguing about circumstances they can use to kick a
8 ballot out and put a ballot in, is that right?

9 A Yes. When I interviewed lawyers who worked on that
10 case -- I didn't actually see this. But they told me they
11 had an entire room full of boxes of materials that had
12 been collected as part of that litigation that involved,
13 you know, copies of records and depositions of everybody
14 involved, and lots of documentation.

15 And I think at that time that was considered one of
16 the most documented elections in the history of the United
17 States until we get to the Minnesota Senate race with Al
18 Franken. And that was an extremely close race as well.
19 And a recount was involved. And that one may end up being
20 more documented than the one in Washington. But it was
21 intensively documented for the litigation.

22 Q Having seen that documentation, was there widespread
23 voter impersonation fraud in that case?

24 A No. What there was, if I may?

25 Q Please.

REDIRECT-EXAMINATION OF DR. MINNITE

907

1 A I believe that the article referred to King County.
2 And the District Attorney in King County charged eight
3 people with having submitted absentee ballots for other
4 people, but seven of them were people who had spouses who
5 died just before the election, and they were still
6 charged. They didn't receive prison sentences. But two
7 of them -- I recall the comments from two of them where
8 they were elderly people. The ballot had arrived in the
9 mail because everybody votes by mail. They didn't know
10 what to do with the ballot. One said she just signed the
11 name and sent it back in. That was in King County.

12 So I don't count that as voter impersonation. I
13 counted it as fraud because you're not supposed to do
14 that. And I think somebody should know that in that
15 instance. They said they did. But one man apologized.
16 He said, you know, in my grief, I didn't know what to do
17 and I just signed it and sent it back in.

18 Q So in that case, what fraud there was was absentee
19 voting?

20 A Yes.

21 Q And it was seven out of eight times a person whose
22 spouse had died and they cast the ballot?

23 A Yes.

24 Q So I think Mr. Hearne asked you about news articles
25 popping up around every election about allegations of

REDIRECT-EXAMINATION OF DR. MINNITE

908

1 fraud. Is that consistent with the observations you've
2 made?

3 A Yes.

4 Q Okay. And a lot of what your work has been doing
5 over the last year is chasing those down, is that right?

6 A Absolutely. Yes.

7 Q And have you observed a pattern in doing that?

8 A Well, the pattern has been, at least over the last 10
9 or 15 years, that the fraud arguments rise to the level
10 of, you know, media coverage well before an election. And
11 the allegations are thrown around, and then when you --
12 you both have to follow what happens if there are
13 legitimate concerns, but also, you know, they become part
14 of the campaign, I would say.

15 Q What do you mean by that?

16 A Well, we're seeing it a little bit in the
17 presidential primary contest right now with charges being
18 thrown by one candidate against another about fraud on
19 both sides. And, you know, when you -- you have to look
20 at them. You have to try to figure out what's going on.
21 And in most cases in terms of the pattern, they boil down
22 to something other than fraud.

23 Q And have you made observations about claims of fraud
24 being used as a political tactic?

25 A Yes.

REDIRECT-EXAMINATION OF DR. MINNITE

909

1 Q Have you observed groups that popped up, made
2 allegations of fraud, and then disappeared?

3 A Yes.

4 Q Now, when you were cross-examined, I don't believe
5 you were shown any scholarly articles, but you have
6 reviewed the scholarship on voter fraud, right?

7 A Yes.

8 Q In the cases that you were describing before, defense
9 experts have testified about their research regarding
10 voter fraud, right?

11 A Which defense experts?

12 Q Let me ask about Dr. Hood. Do you recall him
13 testifying about work he's done?

14 A In other cases?

15 Q Yes.

16 A Yes.

17 Q And he's testified on the opposite side of cases from
18 you, is that right?

19 A Well, I haven't actually observed his testimony, but
20 I've read his expert reports.

21 Q And he's done scholarly work on fraud, right?

22 A He did do one early article. Right.

23 Q What did he find?

24 A He found no fraud.

25 Q And going back to this point about fraud being a

REDIRECT-EXAMINATION OF DR. MINNITE

910

1 tactic. Do you recall being asked some questions about a
2 video of James Moran?

3 A Patrick Moran?

4 Q Thank you. Do you recall being asked some questions
5 about that?

6 A A few questions.

7 Q And was that a -- was that a -- well, that was a
8 sting video, right?

9 A That's how I would see it.

10 Q So, it was essentially manufactured evidence of
11 fraud?

12 A Well, yeah. Well, manufactured in trying to trap
13 somebody into doing something stupid, which I think that
14 fellow admitted later he did.

15 Q Briefly, you were asked about tax fraud cases before?

16 A Yes.

17 Q Was that a priority subject matter for the Bush
18 administration prosecuting, do you know?

19 A I don't know. It didn't rise to the level of Number
20 1 or Number 2 according to Mr. Donsanto, who was the
21 election crimes branch director.

22 Q But election fraud was Number 2?

23 A That's what he said.

24 Q All right. I want to ask you about two documents you
25 were questioned on. The first is DX 397, which is your

REDIRECT-EXAMINATION OF DR. MINNITE

911

1 article about modeling problems.

2 THE COURT: Is that the defenses' exhibit or the
3 plaintiffs' exhibit?

4 MR. KAUL: I'm sorry. Defendants' Exhibit 397.

5 And I'm going to ask Ms. Schultz to bring it up just
6 to refresh her memory about what the conclusion says. And
7 I apologize, I don't have the page number, but it's the
8 very end of the article.

9 BY MR. KAUL:

10 Q Now, you were asked -- and I'm not going to use it
11 quite yet. But you were asked about a couple of
12 paragraphs in this conclusion, is that right?

13 A Yes.

14 Q Now, I'm going to ask Ms. Schultz to pull up the
15 third paragraph now. And in your article, did you, after
16 discussing problems with statistical analysis at the time
17 of modeling turnout, did you discuss a promising
18 alternative to determining whether voter ID laws impose a
19 disproportionate impact on minority voters?

20 A Yes.

21 Q And what was that?

22 A Well, we said he didn't think the science was up to
23 the task. We didn't think that the data or the
24 statistical methods we had for analyzing it would allow us
25 enough precision to measure something like a 1 or a 2 or

REDIRECT-EXAMINATION OF DR. MINNITE

912

1 even a 3% suppressive effect on turnout. So if voter ID
2 laws in the aggregate had only say like 1 or 2%
3 suppressive effect, that is, you could isolate that voter
4 ID law as the single causal effect of something like 1 or
5 2% on turnout, we would not be able to measure it
6 effectively - this was at the time - because we didn't
7 think the data that has been developed and the tools give
8 us that level of precision.

9 What I'm saying is that suppressive effect could be
10 within the bands of kind of an error rate. And you
11 wouldn't know are you looking at an actual causal effect,
12 or are you seeing an effect, but it's caused by other
13 random problems -- or random noise in the data. So we
14 said given that, why don't you just ask how many people
15 don't have the ID. That should help give you a sense of
16 what the problems could be better than arguing at this
17 point about turnout because we've only had a couple of
18 states really put these restrictive laws in. We don't
19 have, you know, a big enough sample in that regard. And
20 we don't have enough time to see because turnout is such a
21 complex phenomenon, and many things impact it. We need a
22 longer range of time to see if we can tease out the
23 effects of any single law.

24 It becomes very complicated because both -- because
25 there are many factors involved in turnout. But also

REDIRECT-EXAMINATION OF DR. MINNITE

913

1 because, as we see now, the states, actually when they are
2 adopting these laws, I don't know if any two states are
3 exactly the same. You have to look at what are the
4 exceptions, you know, what do you do if you don't have it.
5 All these things factor into the comprehensive impact of
6 the law on turnout, and it becomes very complicated to
7 model it.

8 And we said it's reasonable to ask how many people
9 actually have this ID at this point, and worry about that.
10 It was easier to do that kind of analysis then to put a
11 lot of weight on the statistical analysis that was getting
12 you into the debate of is it suppressing turnout or not.

13 Q Did you review Dr. Rodden's expert report in this
14 case?

15 A I did not.

16 Q Now, you refer to at the time of the article, has the
17 state of the data available to analyze voter
18 identification laws changed since this article came out in
19 2009?

20 A Well, only to the extent that we now have, you know,
21 five, six, seven, eight more years of experience that
22 people have been using the data set that Professor Richman
23 relied on, the Cooperative Congressional Election Study,
24 and adding that to the mix. Although, I don't know that
25 I've seen any studies using that to measure the impact of

REDIRECT-EXAMINATION OF DR. MINNITE

914

1 photo ID laws.

2 But the main thing that's happened is the passage of
3 time, which gives us more leverage on it. And so I have
4 been seeing just recently some more studies that are kind
5 of beginning to build a picture of what's going on.

6 Q And have more states also adopted voter
7 identification laws since the time of this article?

8 A Yes.

9 Q Does that also give you more statistical leverage?

10 A Yes.

11 Q And you mentioned some recent studies. Are you
12 familiar with the recent study conducted by the GAO?

13 A Yes.

14 Q I'm not going to ask you about the details of that
15 because it will come up elsewhere, but how is the GAO
16 regarded in terms of the quality of its studies within the
17 profession?

18 A I think it's generally -- I say the term "gold
19 standard" in terms of professionalism and the quality of
20 the statistical research that they do.

21 Q And then last I want to ask you a couple of questions
22 about the Carter-Baker report, which is Defendants'
23 Exhibit 328. And I'm going to bring up a couple of pages
24 to refresh your recollection with respect to some
25 questions you were asked about before.

REDIRECT-EXAMINATION OF DR. MINNITE

915

1 MR. KAUL: Let's pull up Exhibit Page 27.

2 THE COURT: Page 27 of your Exhibit 328, correct?

3 MR. KAUL: That's right. It's a defense exhibit.

4 THE COURT: Defense Exhibit. Thank you.

5 MR. KAUL: And an actually, I guess it's 326 and 327.

6 BY MR. KAUL:

7 Q The bottom paragraph on Page 26, do you recall being
8 asked about that? And it continues on to 27.

9 A Yes.

10 Q Am I right that you were asked about the portion that
11 leaves off there?

12 A Are you pointing up or down?

13 Q The portion you were asked about left off at the word
14 "Confidence"?

15 A I don't actually recall.

16 Q Fair enough. But the last sentence in that paragraph
17 stated, "We viewed the other concerns about IDs that they
18 could disenfranchise eligible voters" and I think there's
19 a word there, "have an adverse effect on minorities, or be
20 used to monitor behavior as serious and legitimate, and
21 our proposal below aims to address each concern."

22 Is that what the report stated to the best of your
23 recollection?

24 A Yes.

25 Q And you talked earlier about what the Carter-Baker

REDIRECT-EXAMINATION OF DR. MINNITE

916

1 report had proposed with respect to aggressively reaching
2 out to registered voters and get them IDs, right?

3 A That's correct.

4 Q And let me also ask you about Page 29 in this report.
5 And these were some of the recommendations on voter
6 identification, is that right?

7 A Yes.

8 Q And I believe you were asked about the first three of
9 these. Does that look right?

10 A Let's see.

11 Q Let's look at all five of them.

12 A Yes.

13 Q Now, point Number 5 there was another recommendation
14 there, right, or 2.5.5, I guess it is?

15 A Yes.

16 Q And this indicates that "*In the event there's a*
17 *national identification card mandated, it should include*
18 *information related to voting and be connected to voter*
19 *registration.*" Is that right?

20 A That's correct.

21 Q Now, I think you were asked about whether Virginia
22 had made it easier to register on cross-examination by
23 adopting on-line registration?

24 A Yes.

25 Q Do you know what percentage of individuals who lack

REDIRECT-EXAMINATION OF DR. MINNITE

917

1 DMV identification are on-line, or how that compares to
2 the population at large?

3 THE COURT: At what point in time?

4 MR. KAUL: Currently.

5 THE COURT: Okay.

6 A Not offhand.

7 Q Is it your understanding that a number of voters lack
8 access to the Internet?

9 A People do. Yes.

10 MR. KAUL: I have no further questions.

11 THE COURT: All right.

12 May the doctor be excused at this point?

13 MR. HEARNE: Yes, Your Honor.

14 THE COURT: All right. Doctor, thank you. You're
15 excused. Thank you very much for your time in the case.

WITNESS STOOD ASIDE

17 MR. FINBERG: Your Honor, at this time, by agreement
18 with the plaintiffs, and we've talked to the Court about
19 this, we're going to call two witnesses on behalf of the
20 defendants out of order due to their obligations next week
21 with the primary.

22 THE COURT: That's fine. As I mentioned to
23 yesterday, I'll give you-all as much latitude as possible.

24 MR. FINBERG: Thank you, Your Honor.

25 The first witness is going to be Myron McClees.

REDIRECT-EXAMINATION OF DR. MINNITE

918

1 THE COURT: Could you spell that last name for me,
2 please.

3 MR. FINBERG: M-C-C-L-E-E-S-E.

4 THE COURT: All right. Very well.

5 MR. FINBERG: No E at the end, Your Honor.

6 We'll get him to spell his name on the record once
7 he's on the stand.

8 THE COURT: Okay. I'm counting on you.

9 MR. FINBERG: And, Your Honor, we've prepared binders
10 of the exhibits we intend to use with our witnesses so
11 that they're not fishing through the various volumes
12 there. So if it's all right with the Court, we'd like to
13 give a copy to plaintiffs' counsel, put a copy on the
14 stand, and we will provide a copy as well to the Court.

15 THE COURT: That will be fine.

16 Sir, if you would please raise your right hand, left
17 hand on the Bible, and face the Clerk of the Court.

18 THE CLERK: You do solemnly swear that the testimony
19 which you are about to give, in this case, before this
20 Court, shall be the truth, the whole truth, and nothing
21 but the truth, so help you God?

22 MR. MCCLEES: I do.

23 THE COURT: Have a seat on the witness stand.

24 MR. FINBERG: Your Honor, may I approach the witness
25 stand to put the binder on there, please.

DIRECT EXAMINATION OF MYRON MCCLEES

919

1 THE COURT: Yes, sir.

2 Mr. McClees, if you would be kind enough to put your
3 full name on the record, and spell your first and last
4 name so my court reporter can make sure we have it
5 correct?

6 MR. McCLEES: Yes, Your Honor.

7 THE COURT: Go right ahead.

8 MR. McCLEES: Myron Demarcus McClees. Myron,
9 M-Y-R-O-N. Demarcus, D-E-M-A-R-C-U-S. McClees,
10 M-C-C-L-E-E-S.

11 THE COURT: All right. Very well.

12 All right, Ms. Hart, go right ahead.

13 MS. HART: Thank you, Your Honor.

14 Whereupon, **Myron McClees**, having been
15 duly sworn in, testifies as follows:

16 DIRECT EXAMINATION

17 BY MS. HART:

18 Q Good morning, Mr. McClees.

19 A Good morning.

20 Q Could you please describe your education background,
21 starting after high school.

22 A Certainly. I went to Virginia Tech for undergrad.

23 From there, I got a bachelor of science in psychology and
24 a bachelor of arts in art history --

25 COURT REPORTER: Your Honor, I --

DIRECT EXAMINATION OF MYRON MCCLEES

920

1 THE COURT: Mr. McClees, you need to speak slowly so
2 this young lady can take it down, okay.

3 MR. McCLEES: My apologies, Your Honor.

4 A So a bachelor of arts in art history, with a
5 concentration in classical studies, and a bachelor of
6 science in psychology. After that, I went to the William
7 & Mary School of Law, class of 2010.

8 Q Where are you currently employed?

9 A I'm currently employed with the Department of
10 Elections, which was previously part of the State Board of
11 Elections.

12 Q How long have you worked there?

13 A I have worked there for -- it will be five years this
14 coming May.

15 Q And what is your current job title?

16 A I am a policy analyst.

17 Q Is that the job that you held the entire time that
18 you've been there?

19 A Yes, it is.

20 Q As a policy analyst for the Department of Elections,
21 do you typically have a role in pending or enacted
22 legislation?

23 A Yes, I do.

24 Q What is your role?

25 A I draft -- sometimes I draft actual legislation where

DIRECT EXAMINATION OF MYRON MCCLEES 921

1 the genesis of it is the agency. So we have our agency
2 bills, as well as I review various election-related bills
3 that are introduced by the actual legislators themselves.
4 We have three policy analysts, and so if it falls into my
5 subject area then I would draft a legislative active
6 summary on that legislation.

7 Q What is your subject matter area?

8 A My subject matter area is election day procedures,
9 recounts, contests of elections. Things of that nature.

10 Q Are you familiar with SB1256?

11 A Yes, ma'am, I am.

12 Q Could you describe briefly your general understanding
13 of SB1256?

14 A Certainly. SB1256 changed the identification
15 standards for the Commonwealth of Virginia requiring
16 different IDs, and all the IDs have photographs upon them.
17 So, for instance, a social security card, which was
18 previously acceptable, was no longer acceptable due to the
19 lack of photo upon it, as well as the concealed handgun
20 permit was removed. But there were others that were added
21 on that also had photos.

22 Q How did you first hear about SB1256?

23 A I believe it was first referred to me by my immediate
24 supervisor, Susan Lee. She stated to me that there was
25 another photo ID bill that was coming down the pike, and

DIRECT EXAMINATION OF MYRON MCCLEES

922

1 so that's where I first heard about it.

2 Q So did SB1256 fall into your subject matter
3 expertise?

4 A Yes, ma'am, it did.

5 Q So once you received SB1256, what did you do with it?
6 What was your first step in the process?

7 A Certainly. The first step of the process, I looked
8 at the summary of the bill to get a general idea of what
9 the bill is going to try to accomplish. And then I look
10 at the specific wording of the bill. From there, I would
11 draft an LAS.

12 Q What is an LAS?

13 A Certainly. An LAS is a Legislative Action Summary.
14 First things it asked for is the affected constituents of
15 the bill. So I would look at how does it affect voters.
16 How does it affect different members of the election
17 community. How does it affect us as an agency. So that's
18 the first section of a Legislative Action Summary.

19 The second section is recommendations. So on that
20 area, I would cover things saying whether it was related
21 to another bill, you know, was it completely synonomous
22 with another bill that was introduced. Generally, how it
23 would affect Virginia. How would it change all of our
24 procedures. Does it even do what the sponsor thinks it
25 does. Sometimes they don't.

DIRECT EXAMINATION OF MYRON MCCLEES

923

1 So I give all of those recommendations in a second
2 section.

3 Q So did you draft a Legislative Action Summary
4 regarding SB1256?

5 A Yes, ma'am, I did.

6 Q And did the agency provide that Legislative Action
7 Summary to the governor's office?

8 A Yes, ma'am, it did. It goes through a couple of
9 procedures internally before it gets all the way out of
10 the agency.

11 Q And did the agency take a position on SB1256?

12 A No, ma'am. That one was a no position.

13 Q Did you personally attend committee hearings at which
14 SB1256 was debated?

15 A Yes, ma'am, I did.

16 Q Which committees?

17 A That would be the subcommittee for Privileges and
18 Elections in the Senate, as well as the full committee of
19 the Privileges and Elections Committee in the Senate.

20 Q In your role as a policy analyst, is that something
21 you typically do, attend committee hearings?

22 A Yes, ma'am, it is.

23 Q What is your role at those committee hearings?

24 A My role at the committee hearings, it can be two
25 things. First of all, it can be if the sponsor of the

DIRECT EXAMINATION OF MYRON MCCLEES

924

1 bill needs specific information, that's normally an agency
2 sponsored legislation. If they don't know the technical
3 aspect of something, sometimes I give input there.

4 And then also just to hear exactly what is occurring,
5 the debate on the bills, so that way I know -- first, it
6 helps me know exactly what the sponsor intends for the
7 bill to do, as well as it lets me know of other concerns
8 that I can take into account when giving further input on
9 the bill in an enrolled bill review, or when implementing
10 the bill itself.

11 Q So what was your role when you attended the committee
12 hearings specific to SB1256?

13 A Specific to SB1256, I wanted to see its progression
14 to find out what the arguments were for and against. What
15 were they attempting to accomplish. How I could go about
16 implementing it. So just to get input to help me do a
17 better job if it were to make it all the way through.

18 Q In the committee hearings that you attended, did
19 anyone speak out in favor of the bill?

20 A Yes.

21 Q What were the general arguments in favor of the bill?

22 A The general arguments in favor of the bill were they
23 were going to help reduce voter fraud. That was -- that
24 was the main thing is just to avoid voter fraud, that I
25 can remember specifically.

DIRECT EXAMINATION OF MYRON MCCLEES

925

1 Q So you drafted the legislative action summary, you
2 attended the hearings, at what point does SB1256 come back
3 inside the agency?

4 A Certainly. After it passes both Houses, we're asked
5 to create a enrolled bill review. So after -- what we do
6 at that point in time is we kind of do another LAS. But
7 it takes into account we change the habit along the way
8 during the process. So if this is amended in any way, we
9 take that into account.

10 Also, sometimes arguments come up in the middle of
11 committee meetings where things that I didn't anticipate,
12 or I didn't look at from the specific wording of the bill,
13 then I can put those into my analysis as well.

14 Q Does the agency also draft regulations with respect
15 to bills that come back to it?

16 A The point of drafting regulations would be after the
17 bill fully passes and is signed by the governor.
18 Sometimes they're vetoed, and to draft an entire
19 regulation and go through the regulatory process would be,
20 you know, utterly superfluous is we were to -- if it were
21 to be killed along the process. So we won't get involved
22 in that portion of it until after it's fully signed and we
23 know it's going to become law.

24 Q Is part of your role as a policy analyst to draft
25 regulations?

DIRECT EXAMINATION OF MYRON MCCLEES

926

1 A Yes, ma'am, it is.

2 Q Did you end up drafting any regulations regarding
3 SB1256?

4 A Yes, ma'am, I did. There was one that I drafted from
5 scratch. It was 1 VAC 20-40-90, as well as I amended the
6 definition section in 1 VAC 20-40-10.

7 Q All right. Talk to me about 20-40-90. What did you
8 draft there?

9 A 20-40-90 states exactly what a person needs to do in
10 order to obtain a free ID from our office. So that was
11 basically stating that they need to fill out an
12 application, they need to provide a signature. I think
13 all the steps that are necessary there in order to -- for
14 a person to get an ID are contained in 20-40-90.

15 Q Is that the regulation that you drafted first, and
16 the bill came back after it was passed?

17 A Yes, ma'am.

18 Q All right. And then you mentioned 20-40-10. What is
19 that?

20 A 20-40-10 is the definition section. And in there, I
21 included a definition of what is a valid ID. So, in
22 20-40-90, it states that a person without a valid ID can
23 get a free ID from us. We needed to find exactly what is
24 considered a valid ID, and so what's what I was putting
25 into -- one of the things I specifically remember putting

DIRECT EXAMINATION OF MYRON MCCLEES

927

1 in 20-40-10.

2 Q When you began drafting the definition of "valid,"
3 where did you start?

4 A I started with our definition that we previously
5 relied upon. So in the "What-If" document, it had
6 "What-If" -- you know, what IDs would be acceptable at
7 that point in time. So I started there and I worked out
8 from there.

9 So I think that at that point in time, the definition
10 of valid said that -- you know, valid and current said
11 that it was either unexpired or expired within 30 days
12 previously, so I worked from there and moved forward.

13 THE COURT: Did you come up with the expiration date
14 restriction, or was that in the bill?

15 MR. MCCLEES: No, Your Honor, that was -- I came --
16 we already had determined that it preexisted the passage
17 of this, Your Honor. And then after -- but it wasn't
18 based on a specific statute.

19 THE COURT: So the restriction on expired
20 identification, was that by regulation or by statute?

21 MR. MCCLEES: That was by regulation, Your Honor.

22 THE COURT: Regulation issued by your office, right?

23 MR. MCCLEES: Yes, Your Honor.

24 THE COURT: All right.

25 Go right ahead, Ms. Hart.

DIRECT EXAMINATION OF MYRON MCCLEES

928

1 MS. HART: Thank you, Your Honor.

2 MR. MCCLEES: If I can just address something else
3 for Your Honor?

4 THE COURT: All right. Go ahead, sir.

5 MR. MCCLEES: Certainly. I just wanted to state that
6 the 30 days was not based on a regulation. The one that
7 preexisted the drafting of -- my drafting of 20-40-10, it
8 was just in guidance documents. It was not a regulatory
9 standard, the 30 days, Your Honor.

10 THE COURT: So what expiration date did you-all
11 publish by regulation?

12 MR. MCCLEES: By regulation, the first one that we
13 published with the no expiration date -- the expiration
14 date was inconsequential was the very first regulation
15 that I passed in 20-40-10. We just had a general standard
16 of 30 days, but it was not based on regulation before
17 that.

18 BY MS. HART:

19 Q Why don't you walk us through the process. You had
20 the 30-day guidance. You ultimately recommend something
21 to the Board. Walk us through the process.

22 A Certainly. So in the first version I brought before
23 the Board, I had a definition of valid. It had other
24 things within it.

25 Q And if I may interrupt you. Just for now, specific

1 to the expiration date, what were your recommendations,
2 what did the Board --

3 A Certainly. I had no recommendations in my very first
4 version I brought before the Board for consideration.
5 With a regulatory process, you bring forward a regulation,
6 it's reviewed, then the Board can vote to put it up for
7 public comment.

8 After a public comment period, then the Board can
9 fully adopt the regulation at that point in time. So the
10 very first time I brought it up, I believe it was in
11 February of 2014. I brought a regulation -- it did not
12 state anything specific to expiration dates. At that
13 point in time, the vice chair during the hearings asked me
14 about --

15 THE COURT: Your suggested regulation did not have an
16 expiration date, right? It was "*inconsequential*," as you
17 called it?

18 MR. MCCLEES: Yes, sir. Well, I -- okay. What
19 happened was that the -- I was not addressing expiration
20 within the first version I brought; however, during the
21 hearing, it was -- I was specifically asked how do we
22 handle expired IDs. It was there that I had informed the
23 Board on what our current standard was, which was that we
24 have guidance documents saying that if they're expired for
25 30 days, or less, then they'll be acceptable.

DIRECT EXAMINATION OF MYRON MCCLEES

930

1 It was at that time that the Board -- or two members
2 of the Board stated that they did not like that standard,
3 and they wished for me to address that standard in the
4 final version of the regulation that I was to bring to
5 them.

6 THE COURT: So as a result of that Board meeting, no
7 resolution of that issue occurred, is that right?

8 MR. MCCLEES: That is correct, Your Honor.

9 THE COURT: They asked you to study it?

10 MR. MCCLEES: They wanted me to put it for public
11 comment.

12 THE COURT: Okay.

13 MR. MCCLEES: Yes, Your Honor.

14 THE COURT: Take it from there. What happened?

15 MR. MCCLEES: Yes, Your Honor.

16 A So at that point in time, I drafted the regulation
17 fully for 20-40-10. It did not specifically state
18 expiration upon it because both the chair and the
19 vice-chair stated that they did not want an expiration
20 date to affect the acceptability of the document for
21 identification purposes. So I drafted the regulation
22 saying that here are the criteria to be taken into account
23 for whether a ID is valid, and it did not have expiration
24 within it.

25 So, by omission --

DIRECT EXAMINATION OF MYRON MCCLEES 931

1 COURT REPORTER: Sir, can you please slow down.

2 MR. MCCLEES: I apologize, ma'am.

3 COURT REPORTER: I appreciate it. Thank you.

4 A So, by omission, the fact that I stated these are the
5 criteria that can be considered when considering whether
6 an ID is valid, then all IDs that are expired would be
7 allowed. When I brought this before the Board, the Board
8 stated they wanted a specific statement within the
9 regulation that stated that unexpired IDs were acceptable.

10 And when I said "*the Board*," I mean the chair and the
11 vice-chair.

12 So from there, I -- during the meeting, they -- I
13 went upstairs. This meeting was held in the basement of
14 our building. I went upstairs, put together a sentence,
15 brought it back down, passed out copies of my proposed
16 language, and the Board adopted that into 20-40-10 for
17 their final version.

18 THE COURT: And just to clarify, that amended
19 language indicated that there was no expiration date
20 requirement on the ID for it to be valid, is that correct?

21 MR. MCCLEES: Yes, Your Honor.

22 THE COURT: Okay.

23 Ms. Hart, go ahead.

24 BY MS. HART:

25 Q In the currently operable language of the

DIRECT EXAMINATION OF MYRON MCCLEES

932

1 regulations, is there an expiration date?

2 A Yes, ma'am.

3 Q What is the regulation on that?

4 A The regulation now currently states that it's -- an
5 ID is valid if it is unexpired or expired for 12 months or
6 less.

7 Q How did it get from a 30-day expiration date, to no
8 expiration date, to 12 months?

9 A Sure. The original version that passed, I want to
10 say it was June of 2014, had the language that I was
11 speaking about stating that the expiration date was
12 inconsequential. I left on vacation. I came back from
13 vacation, and I heard that there was concern about this in
14 that the Board opened it up for public comment again, and
15 they wished to put a time period on when ID -- expired is
16 to be acceptable.

17 Q So the public comment is what initiated the 12-month
18 expiration date -- expiration limitation?

19 A I would state there were other pressures that were
20 put upon -- there were -- it was the genesis was the
21 Board. I think the chairman changed his mind on the idea,
22 and that is what promoted the public comment. It wasn't
23 just public comment came out of nowhere. It was the Board
24 wanted to put it up for public comment because they wished
25 to make a change. And then after that there was a public

DIRECT EXAMINATION OF MYRON MCCLEES 933

1 comment period, a full public comment period, we received
2 more public comment than I had ever seen on any regulation
3 at that point in time.

4 THE COURT: Explaining to me how you conduct the
5 public comment. What is the vehicle you use, and how many
6 responses did you get in this case, if you know?

7 MR. MCCLEES: Yes, Your Honor. What we do is we take
8 the regulation, we put it up on Virginia Town Hall. It's
9 a Website that all Virginia agencies use when putting
10 forward proposed regulations, Your Honor.

11 THE COURT: And that allowed viewers to respond, I
12 assume?

13 MR. MCCLEES: Yes, Your Honor, it does.

14 THE COURT: Okay.

15 MR. MCCLEES: And I believe we received over 500
16 comments on that one. And just to give Your Honor an
17 idea, on most regulations, I might get 12 comments.
18 Somewhere in there. Less than 20, certainly. And so this
19 was certainly way more than I was accustomed to.

20 THE COURT: Go right ahead, Ms. Hart.

21 BY MS. HART:

22 Q And in your practices and procedures, do you provide
23 those public comments to the Board for their review?

24 A Yes, ma'am, I do.

25 Q So ultimately the Board passed a 12-month expiration

DIRECT EXAMINATION OF MYRON MCCLEES

934

1 limit?

2 A Yes, ma'am. It did.

3 Q Would it be fair to characterize that as a
4 compromised position?

5 A Yes. There was a -- there were people asking for no
6 expired IDs within some of the comments. There were
7 people asking for absolutely unexpired IDs, which is the
8 version that they had previously adopted. So, to say, you
9 know, certainly one year falls between nothing and
10 something. So, certainly.

11 Q Fair enough. So after SB1256, you drafted the
12 regulations, the regulations were adopted, were you
13 involved in any outreach efforts to educate the community
14 on the new law and the regulations that implemented it?

15 A Yes, I was to an extent. Certainly.

16 Q Were you specifically involved in any outreach
17 efforts to the African-American community regarding
18 SB1256?

19 A Yes.

20 Q Could you describe those efforts?

21 A Certainly. I met with the NAACP in Hanover County at
22 one point in time.

23 THE COURT: What county?

24 MR. MCCLEES: Hanover County.

25 THE COURT: Hanover County.

DIRECT EXAMINATION OF MYRON MCCLEES

935

1 A I also met with -- let's see. There was a letter
2 that went out to the clergy. To the members of the black
3 clergy. A lot of them were in highly populated areas -
4 Tidewater, Richmond. So I sent out a letter to them,
5 along with a flier, I believe, that explained the voter ID
6 standard.

7 Q Let's start with your presentation to the NAACP. How
8 was it that you came to speak in front of the NAACP in
9 Hanover County?

10 A I believe that the registrar, Teri Smithson, asked
11 the agency to -- you know, said that she was going to be
12 speaking with NAACP, and asked us for information. And we
13 volunteered to actually come and speak ourselves if she
14 wanted. And she jumped at the opportunity.

15 Q And the information that you provided the
16 African-American churches, what prompted you to do that?

17 A If I remember correctly, I believe it was Don Palmer,
18 the secretary of the agency. I believe he stated he had a
19 list of people that he wished to send this out to. So I
20 drafted an e-mail, and sent out the materials.

21 Q And it was your understanding that those were clergy
22 members?

23 A Yes. I believe they were clergy members. And I'm
24 positive that at least of them was because it went to the
25 church that my mother attends.

DIRECT EXAMINATION OF MYRON MCCLEES

936

1 Q All right. Did you speak at any other meetings where
2 the NAACP had a presence?

3 A Yes, I did. There was a meeting to be held at the
4 Patrick Henry Building where the NAACP was one of them.
5 There were multiple other organizations there; Virginia
6 Majority League, Women Voters. I remember that we were
7 talking about how we were going to get the word out to the
8 public about the voter ID change.

9 Q So at that particular meeting at the Patrick Henry
10 Building, you were not only working with those groups to
11 figure out how to get the word out, but also describing
12 what the new law was?

13 A Certainly. But mind you, this is a very savvy group,
14 so a lot of them know what the standard is. But,
15 certainly, I was in the room to help make sure that we
16 were fully describing the law correctly and talking about
17 things that were within the proper procedures.

18 Q Do you know if the SBE conducted any specific voter
19 outreach to the poorer communities?

20 A Let's see. Oh, yes. When it comes to -- there was a
21 meeting that we had with Virginia Organizing in
22 Charlottesville. I remember that one. And Virginia
23 Organizing, they have groups that there within -- they
24 have branches that are within Richmond, Petersburg,
25 Danville. And I remember that meeting as well.

DIRECT EXAMINATION OF MYRON MCCLEES

937

1 Q Can you describe the typical demographic that
2 Virginia Organizing services?

3 A I would say it was lower income, as well as minority
4 groups.

5 Q Did the SBE do any outreach in the Latino community?

6 A I know that we had to produce all of our -- any
7 official document we had to produce in Spanish as well
8 for -- specifically for -- because Fairfax County, they
9 are covered under Section 205 of the Voting Rights Act,
10 and so therefore they have to produce things in a minority
11 language, specifically Spanish for Fairfax.

12 Q What about on-line? Did the SBE undertake to educate
13 the public via any on-line method?

14 A Yes. I believe we changed our voter ID chart. Our
15 materials on the Website were changed to reflect the -- to
16 guide the voters. In addition, we have a full section
17 that talks about voter ID law on the Website now.

18 Q Which Website is that?

19 A Elections.Virginia.gov.

20 Q Did you make any specific efforts to target --
21 outreach efforts specifically to target those groups that
22 had been opposed to the bill during committee hearings?

23 A Well, certainly. First of all, the Patrick Henry
24 meeting, you know, all the groups that were there were
25 groups that worked on it that specifically spoke against

DIRECT EXAMINATION OF MYRON MCCLEES

938

1 the bill during its consideration in the General Assembly.

2 Q Why were you targeting them specifically?

3 A Because they had certain concerns about making sure
4 that the voters were able to get a hold of IDs. You know,

5 these groups were certainly against the idea of the bill.

6 But they wanted to make sure that the impact of the bill
7 wouldn't affect, you know, voters that didn't have IDs.

8 You know, that they would be given a proper opportunity.

9 Q Did the SBE provide any guidance materials to the
10 general registrars specifically regarding implementation
11 of 1256?

12 A Certainly.

13 Q Did you have any role in drafting those guidance
14 materials?

15 A Certainly. So, for instance, the GRE book, I would
16 certainly draft chapter -- well, not draft chapters. I
17 would edit chapters because it's a preexisting document.

18 In addition, there was a "What-If" guide for them.
19 There was a webinar for them that I conducted. Multiple
20 webinars for them that I conducted. So there were
21 multiple outreach efforts for the general registers that I
22 was involved in. Certainly.

23 Q Let's start with the GRE handbook.

24 MS. HART: I would like to introduce Defendants'
25 Exhibit 404.

DIRECT EXAMINATION OF MYRON MCCLEES

939

1 THE COURT: When you say "*introduce*," you're moving
2 that into evidence?

3 MS. HART: I would like to if I've laid an adequate
4 foundation.

5 THE COURT: Pardon?

6 MS. HART: If I've laid an adequate foundation, yes,
7 I'd like to.

8 THE COURT: I don't know that you've laid any
9 foundation at all at this point, frankly.

10 MS. HART: Well, may I show him the document?

11 THE COURT: Yes, ma'am. You may go right ahead and
12 do that.

13 Is there any objection to 404? If there's not, I'll
14 just go ahead and let it in.

15 MR. KAUL: I believe there's not, Your Honor. And to
16 be clear, we don't have any objection to them publishing
17 their documents as they're establishing foundation.

18 THE COURT: That will make things very easy.

19 If they don't object to it, we'll admit 404.

20 MS. HART: Thank you.

21 (Defendants' Exhibit 404 is received.)

22 THE COURT: And 404, again, Ms. Hart, what is that?

23 MS. HART: It's the general registrar's handbook.

24 THE COURT: Thank you.

25 BY MS. HART:

DIRECT EXAMINATION OF MYRON MCCLEES

940

1 Q And I'd like to shortcut this 500-page document by
2 asking if --

3 THE COURT: That would be appreciated.

4 BY MS. HART:

5 Q If you flip to Page 490, I believe Tab 29
6 specifically deals with provisional voting.

7 You can use either one.

8 A I'll use the screen. Thank you.

9 Q Do you recognize the document in front of you?

10 A Yes, ma'am, I do.

11 Q What is that?

12 A This is Chapter 29 of the GRE book. And Chapter 29
13 specifically deals with provisional voting.

14 Q Did you have a hand in drafting Chapter 29 regarding
15 provisional voting?

16 A Yes, ma'am, I did.

17 Q Can you just walk us through the recommended process
18 for provisional voting that you provided to the general
19 registrars through the handbook?

20 A Certainly. So a lack of -- a person that
21 provisionally votes due to lack of ID is different from a
22 regular provisional voter. A regular provisional voter,
23 there's a possibility of their situation be ameliorated
24 without any action whatsoever by the voter.

25 However, when it comes to voter ID, the statute

DIRECT EXAMINATION OF MYRON MCCLEES

941

1 specifically states that the voter is to provide a copy of
2 their photo ID in order for their ballot to be accepted.
3 So we have a whole different procedure that's involved
4 there. There's a separate provisional ballot envelope
5 that colloquially is referred to as the "lime green," or
6 voter ID envelope. And that one is specifically for
7 voters who lack IDs, and is easily discernible from the
8 other darker green envelope that is normally.

9 One of the reasons we did that is because the general
10 registrar could separate them before the canvas of the
11 ballots, knowing that these you only act on when you get
12 something from the voter, and these you will actually need
13 to do research before the full canvas.

14 In addition, on the regular ballot envelope, we had
15 to establish a check box for a person who was a compound
16 provisional voter. So let's say somebody is already
17 marked at the poll books having, plus they lack ID, that's
18 a compound situation where there's two deficiencies that
19 we have. And so in that situation, we added a check box
20 so that we could fully mark that on the regular
21 envelope. As well as we just guide them on accepting the
22 copies of the IDs through e-mail, things of that nature,
23 and to provide that to the Board.

24 Q When you say you "guide them on accepting copies of
25 the IDs," do you mean after the voter has cast a

DIRECT EXAMINATION OF MYRON MCCLEES

942

1 provisional ballot, and that would be the curing process?

2 A Yes, ma'am.

3 Q How did you communicate these procedures to the
4 general registrars?

5 A We have annual training that we conduct, as well as
6 we had webinars on this. We had also -- let's see, with
7 this one -- well, of course the GRE book itself is
8 involved. So there were multiple things to specifically
9 get this information out because it was a brand-new
10 process for everyone.

11 Q How did you distribute the GRE handbook among the
12 general registrars?

13 A Sure. Every year, we updated the GRE book, and make
14 it available, before July 1 when legislation goes into
15 enactment. So once it's all fully available, we send a
16 communication out to the field and let them know that the
17 GRE book is ready, and they can, therefore, go ahead and
18 start reviewing it, printing it for their purposes.

19 Q Where is the GRE handbook available?

20 A It's available through our Website as well. So I
21 know there was a Town Hall, which I -- a Town Hall Website
22 which I previously mentioned. I know it's available
23 there, as well as there are certain Share Point, which is
24 something internal to our agency as well as the general
25 registrar electoral community. It's also available

DIRECT EXAMINATION OF MYRON MCCLEES

943

1 there.

2 Q And you mentioned Town Hall. Is that a publically
3 accessible Website?

4 A Yes, ma'am, it is.

5 Q So the general public could have access to the GRE
6 handbook if they wanted it?

7 A Yes, ma'am, they could.

8 Q Did the SBE provide any guidance materials
9 specifically geared towards election officials?

10 A Well, certainly. So this was geared towards, you
11 know, general registrars who are considered election
12 officials. But also Officers of Election, we have
13 guidance documents that are specifically geared towards
14 them. And the What-Ifs document is certainly one of
15 those.

16 Q Could you briefly describe the difference between an
17 election official and a general registrar?

18 A Sure. Can I say Officers of Elections? Is that
19 okay? I'm kind of statute guy.

20 Q Please. My apologies.

21 A Certainly. Officers of Election are people who man
22 the polling places on election day. And so they're
23 registered voters, but it's not "*their day job*." Where
24 general registrars are people who are responsible
25 year-round for registering, applications, and taking care

DIRECT EXAMINATION OF MYRON MCCLEES

944

1 of general election matters. And they are under an
2 electoral board who oversee them.

3 Q So did the SBE undertake any educational efforts to
4 communicate information to the boots on the ground, the
5 Officers of Election, regarding the new regulations?

6 A Yes, ma'am. With the What-If guide, certainly. As
7 well, I believe, we have also other training available,
8 and training tools available.

9 MS. HART: All right. If there's no objection, I'd
10 like to introduce Defendant's Exhibit 69-A, the What-If
11 Guide.

12 THE COURT: What's the number again?

13 MS. HART: S 69-A.

14 THE COURT: Okay.

15 MR. KAUL: No objection. Although, if you could just
16 let us know what the date is because I think we both have
17 some in our exhibit list.

18 MS. HART: I believe it's August 2014.

19 MR. KAUL: Thank you.

20 THE COURT: That's the date of the document?

21 MS. HART: Yes.

22 THE COURT: Go ahead.

23 (Defendants' Exhibit 69-A is received.)

24 BY MS. HART:

25 Q Do you recognize the document in front of you?

DIRECT EXAMINATION OF MYRON MCCLEES

945

1 A Yes, ma'am, I do.

2 Q What is that document?

3 A This is the What-If document. The August 11, 2014
4 version.

5 Q Did you have a hand in drafting that document?

6 A Yes, ma'am, I did.

7 Q What is the purpose of the document?

8 A The purpose of the document is to provide an easy
9 guide for Officers of Election to handle specific issues
10 that they might face in the polling place on election day.

11 Q Why don't we cut to the chase. If you can turn to
12 Page 13 of that document. What does Page 13 describe?

13 A This describes the provisional ballot process for
14 when a person lacks ID, and how to process a voter who
15 lacks ID.

16 Q Can you just walk us through the process as you
17 communicated it to the Officers of Election?

18 A Sure. In that situation, the voter is to be --
19 they're given an envelope. They're to enter the voter's
20 information on the log, the provisional ballot log, which
21 kind of serves as the poll book for provisional voters.
22 They're also to mark that photo ID is the reason the
23 person is voting the provisional ballot.

24 They're also to place it in the sealed lime green
25 envelope, and sign the lime green envelope. And it's to

DIRECT EXAMINATION OF MYRON MCCLEES

946

1 be -- then they're to be provided a provisional ballot --
2 a provisional ballot notice of identification, which gives
3 them the information necessary to ameliorate and have
4 their ballot counted.

5 Q Did you draft the provisional voter notice document?

6 A Yes, I did.

7 Q What guidance does that give the voter who has just
8 cast their provisional ballot?

9 A Sure. It let's them know that the reason that
10 they're voting provisionally is due to lack of ID. And
11 let's them know they have until Friday noon -- the Friday
12 following the election day at noon to provide a copy of
13 their ID in order to have their ballot counted. And that
14 they can do so through e-mail, fax, as well as within the
15 registrar's office.

16 And it provides the specific -- and then the
17 registrars fill that specific information in - their fax
18 number, their e-mail address, their specific office
19 address. That is all, you know, specifically put in there
20 by the general registrars.

21 Q Does it mention the free voter ID?

22 A Yes. The current version specifically mentions that
23 a person could obtain a free ID just by applying at their
24 registrar's office.

25 Q And is that a notice that the Officers of Election

DIRECT EXAMINATION OF MYRON MCCLEES

947

1 are required to provide to voters who cast provisional no
2 ID ballots?

3 A Yes, ma'am.

4 Q How did the SBE communicate these What-If guidance
5 documents to the Officers of Election?

6 A This is one of the election day documents that is
7 specifically required to be given to the Chief Officer of
8 Election for every polling place. So there's multiple
9 things that are to be given to those Chief Officers of
10 Election. This is among them. As well as it's publicly
11 available on our Website. But it is certainly an election
12 day document that must be provided over to the polling
13 place.

14 Q How does the document make its way from the SBE to
15 the Officers of Election?

16 A What we do is we normally send something out to let
17 the general registrars know that the document is final.
18 They print it off.

19 Also, I believe in our Share Point, when we edit
20 these documents, there's a check box to say that this is
21 an election day document. I believe that they're given
22 the ability to just print out all election day documents,
23 and they will print them all out, and go over them, is my
24 understanding of the technical aspect.

25 Q Is it your understanding that the general registrar

DIRECT EXAMINATION OF MYRON MCCLEES

948

1 is the entity responsible for ensuring that the Officers
2 of Election have these document?

3 A On the ground what normally happens is the general
4 registrar does that. Statutorily, it might be an
5 Electoral Board duty. But who normally handles this,
6 from my experience, is it's always the general registrar
7 that handles this sort of thing.

8 Q And is that document, the What-If guide, specifically
9 also publically available?

10 A Yes, ma'am, it is.

11 Q It's on the Town Hall?

12 A Yes, ma'am, it is.

13 Q Is it on the SBE's Website?

14 A I believe what happens now with Town Hall, and with
15 our Website, is I believe it directly hyperlinks to a page
16 with our forms warehouse, and it's within the forms
17 warehouse.

18 Q And that's a document that if I went on-line I could
19 find?

20 A Yes, ma'am, you could.

21 Q You mentioned that you attended these committee
22 hearings on SB1256, is that right?

23 A Yes, ma'am.

24 Q And one of the topics of the hearings was voter
25 fraud?

DIRECT EXAMINATION OF MYRON MCCLEES

949

1 A Yes, ma'am. Certainly.

2 Q Do you recall any debates specific to voter fraud?

3 A Yes, ma'am, I do. Certainly.

4 Q What was the nature the concerns expressed with
5 respect to voter fraud?

6 A I believe that there were a lot -- multi groups who
7 were stating that there is no voter fraud, or no
8 discernable voter fraud; therefore, to try to create a
9 standard that gets rid of voter fraud that doesn't exist,
10 that that shouldn't be undertaken at all. They were
11 stating that, you know, this is being enacted for other
12 reasons other than for voter fraud.

13 And so that was an argument that was consistently
14 levied during the meetings. And I specifically remember
15 the counter to that was Senator Garrett who said that he
16 had prosecuted voter fraud.

17 Q Are you aware of any ways in which SB1256, and any
18 regulations that you drafted, would combat voter fraud?

19 A Well, certainly. If a person is going -- if a person
20 is going to attempt to vote in my name, and they lack any
21 sort of document stating my name, and everything, and they
22 go and attempt to vote, they would be thwarted by this
23 law. Sure. So I guess in that situation.

24 Q And you've also mentioned a public comment period.

25 A As part of your job, did you review and respond to any

DIRECT EXAMINATION OF MYRON MCCLEES

950

1 constituent complaints with respect to SB1256?

2 A Well, certainly. Yes.

3 Q And is that also true in general -- during any
4 regulation, any law that affects election procedures,
5 would you be the recipient of those constituent
6 complaints?

7 A If they fall into my subject area, then, yes, a lot
8 of times they'll make it to my desk.

9 Q If I refer to SB1, do you know what I'm talking
10 about?

11 A Yes. I believe that was the previous photo ID.

12 Q The 2012 voter ID law?

13 A Yes.

14 Q Does that sound right?

15 A Yes.

16 Q After SB1, the 2012 law was passed. Do you recall
17 receiving any constituent complaints regarding that bill?

18 A Yes. Yes.

19 Q Could you describe the general nature of those
20 complaints?

21 A We would have some people arguing that it was
22 unnecessary, and then we would have people who were
23 arguing that they needed to be more stringent.

24 Q What was the prevailing sentiment? What the majority
25 of the complaints?

DIRECT EXAMINATION OF MYRON MCCLEES

951

1 A The majority were actually asking for something more
2 stringent.

3 Q Do you also field constituent complaints on election
4 day?

5 A Yes, I do.

6 Q On election day in 2015, do you recall receiving any
7 constituent complaints specific to the photo ID law?

8 A Yes, I do.

9 THE COURT: What year were you talking about,
10 Ms. Hart?

11 MS. HART: In 2014.

12 THE COURT: Go right ahead with your question. I'm
13 sorry for interrupting you.

14 BY MS. HART:

15 Q How do constituent complaints find their way to you
16 on election day?

17 THE COURT: Did you get an answer to the prior
18 question?

19 MS. HART: I'm just trying to lay the foundation for
20 what he's about to talk about with respect to the specific
21 complaints.

22 THE COURT: All right. Go right ahead.

23 A I'm sorry. Could you restate your question?

24 Q Sure. How do constituent complaints find their way
25 to your desk on election day?

DIRECT EXAMINATION OF MYRON MCCLEES

952

1 A Sure. We normally have a phone bank of multiple
2 people who handle what we consider Tier 1 level things.
3 Inquiries such as where is my polling place. Things like
4 that. How long are the polls open for.

5 Then we have, you know, if the person asking the
6 question is how -- you know, it merits more -- it's
7 unique, more of an expertise in order to answer, then they
8 work their way up the chain until eventually it gets to
9 me, is my understanding of how it works.

10 So unless they are asking something that is policy
11 based, then it would specifically be routed towards or me,
12 or one of the other policy analyst, or somebody else
13 within the agency whose expertise it falls under.

14 Q So in 2014, did you field any specific constituent
15 complaints regarding the photo ID law?

16 A Oh, certainly.

17 Q Approximately, how many did you receive?

18 A On election day or in general in 2014?

19 Q On election day through whenever those provisional
20 voters could cure.

21 A Okay. Yes, I received people who were stating that
22 they weren't able to vote because they didn't have an ID.
23 I had some people who stated that they had to cast a
24 provisional ballot because somebody -- an Officer of
25 Election had challenged their ID on the fact that it

DIRECT EXAMINATION OF MYRON MCCLEES

953

1 didn't have an address, which greatly upset me. So there
2 were multiple that I received on that day.

3 Q How did you address those constituent complaints?

4 A Normally what I do is if I can give specific
5 information to empower the voter to handle it, I do that
6 specifically on the phone. And thereafter, if this is a
7 misapplied standard, which is the case when somebody says
8 that the voter ID has to have an address on it, in that
9 situation I contact the general registrar for the locality
10 that it's in, and informing them so they can get
11 specifically get in contact with that polling place to
12 make sure that they immediately curtail that and hopefully
13 ameliorate the entire situation.

14 Q Is that what you did in 2014 in response to the
15 constituent complaints you received?

16 A Yes, ma'am, it is.

17 Q Can you specifically identify a single individual
18 voter who was wrongly denied the right to vote in 2014
19 based on the photo ID law?

20 A Sure. I remember this lady in northern Virginia,
21 Ms. Cotten.

22 Q And how is it your understanding that she was wrongly
23 denied the right to vote?

24 A If I remember correctly, she didn't have one of the
25 IDs, but I don't remember her being given the opportunity

DIRECT EXAMINATION OF MYRON MCCLEES

954

1 to cast a provisional ballot, is my understanding. That's
2 my recollection.

3 Q Did you get in contact with her specifically?

4 A I did. I did. I spoke with her. And that was the
5 first time I had ever spoken with somebody who hadn't been
6 offered a provisional because of lack of ID.

7 Q What kind of guidance did you give her on election
8 day?

9 A I stated to her what the specific forms of
10 identification were. At this point in time, the polls
11 hadn't closed, so I was trying to see if she would be able
12 to retrieve an ID, and get back to the polling place. And
13 so that's what I was worried about was her being able to,
14 you know, fully cast a ballot.

15 Q Did you explain to her the process of provisional
16 voting?

17 A Yes, I did. I specifically -- I don't specifically
18 remember whether or not she already knew about provisional
19 voting, but I specifically talked about provisional
20 voting.

21 Q What about on election day in 2015, do you recall
22 receiving any constituent complaints specific to the photo
23 ID law?

24 A Certainly, yes.

25 Q Approximately, how many complaints did you receive in

DIRECT EXAMINATION OF MYRON MCCLEES

955

1 2015?

2 A I would say around 10 or so. Somewhere in there.

3 Q Did you personally respond to those complaints?

4 A Yes, ma'am, I did.

5 Q What did you do to address the constituent complaints
6 regarding the photo ID law in 2015?

7 A The same as I always did in 2014. Empower the voter
8 with information as much as I possibly could. And if they
9 can ameliorate, great. If not, I would -- either way, I
10 was going to contact the general registrar and inform them
11 that the standard has been misapplied, if the standard is
12 being misapplied, in the polling place.

13 Q Can you specifically identify a single voter who was
14 wrongly denied the right to vote in 2015 based on the
15 photo ID law?

16 A In 2015, I don't really remember. It doesn't stick
17 out. I just remember Ms. Cotten because she specifically
18 stuck out.

19 THE COURT: You remember who?

20 MR. MCCLEES: Ms. Cotten.

21 THE COURT: That was in 2014.

22 MR. MCCLEES: That was in 2014. That's why I
23 remember that one. But I don't remember a specific one
24 from 2015.

25 MS. HART: Thank you, Mr. McClees.

CROSS-EXAMINATION OF MYRON MCCLEES

956

1 I have no further questions.

2 THE COURT: All right.

3 Cross-examination of Mr. McClees.

4 MR. KAUL: Thank you, Your Honor.

5 **CROSS-EXAMINATION**

6 BY MR. KAUL:

7 Q Mr. McClees, good morning.

8 A Good morning, sir.

9 Q Let me introduce myself. I'm Josh Kaul. I'm one of
10 the lawyers for the plaintiffs in this case. And you were
11 deposed before by my colleague, Ms. Cherry, is that right?

12 A Yes, I was. She's very good, by the way.

13 Q We agree.

14 Let me ask you a few questions about some of the
15 topics that you've been discussing today. But I guess
16 before I do that, I just want to be clear about a couple
17 of things. You're the lead policy analyst for the
18 Department of Elections for voter ID?

19 A For voter ID. Yes.

20 Q Okay. And let me bring you back in time a bit. When
21 you started working at what was then the State Board of
22 Elections, the rules in place allowed a voter to cast a
23 ballot with an affirmation of identity, is that right?

24 A Yes, sir, that is correct.

25 Q And you're not aware of any election administration

CROSS-EXAMINATION OF MYRON MCCLEES

957

1 problems that occurred with an affirmation of identity,
2 right?

3 A No, sir.

4 Q And in 2012, I new voter ID bill was placed that put
5 in place that eliminated the affirmation of identity, but
6 expanded the number of forms of ID that could be used,
7 right?

8 A Yes, sir.

9 Q And you're not aware of any fraud in 2012 that
10 occurred with that voter ID law in place, are you?

11 A No. Fraud isn't something normally that I handle.

12 Q Let me ask you about a few questions towards the end
13 of your examination there. Do you remember discussing a
14 provisional voter notice document that's given to
15 provisional voters?

16 A Yes, sir.

17 Q Now, that form provides various information about how
18 a voter can cure a provisional ballot, right?

19 A Yes, sir.

20 Q But it does not tell a voter how they can get a free
21 ID, does it?

22 A Yes, the current version does. Certainly.

23 Q How long has that version been out?

24 A I don't know, specifically. But the current version
25 does state how you go about getting a free ID.

CROSS-EXAMINATION OF MYRON MCCLEES

958

1 Q Was that version in place for prior elections?

2 A I think it was in place especially for 2015. I don't
3 know the timeline of whether it was available in 2014 or
4 not.

5 Q Okay.

6 THE COURT: Do you know whether the current version
7 is on your Website, Mr. McClees?

8 MR. McCLEES: I'm speaking about the current version
9 of the provisional voter notice/identification, Your
10 Honor.

11 THE COURT: Okay. Thank you.

12 MR. McCLEES: Certainly.

13 BY MR. KAUL:

14 Q And when a voter casts a provisional ballot, they're
15 given an envelope that's a particular color, right?

16 A Yes.

17 Q And it's meant to be distinctive?

18 A Yes.

19 Q What's that color?

20 A It's a lime green color. I think it's officially
21 called vulcan green, I want to say. But we call it lime
22 green.

23 Q Okay. And there's another color called bolt, which
24 is like the Highlighter color. So vulcan green, I'll add
25 that to my list.

CROSS-EXAMINATION OF MYRON MCCLEES

959

1 A Yes.

2 Q And you were discussing the handbook that you guys
3 use?

4 A Yes, sir.

5 Q And I think we said that was 500 pages, is that
6 right?

7 A I'll defer to you-all. I just review my chapters,
8 and then I luckily check that box off and walk away.

9 Q It's several hundred pages long, right?

10 A Yes, sir. It certainly is.

11 Q And have you ever read it all the way through?

12 A I have. When I first started with the agency, I
13 wanted to get abreast as possible on all of our processes.
14 So, yes, I did read it when I first joined the agency.

15 Q Do you know how many people read that the full way
16 through?

17 A It would be my hope that every registrar reads it all
18 the way through. But judging by some of the calls I get,
19 I don't know.

20 Q The calls would indicate that they don't read it all
21 the way through, right?

22 A I get calls on weapons in the polling place all the
23 time. And, you know, there's a specific section --
24 specific details of weapons in the polling place. So that
25 one, yeah.

CROSS-EXAMINATION OF MYRON MCCLEES 960

1 Q But it's 500 pages long, so you can forgive the
2 registrars for not remembering all the details, right?

3 A I'm not the best at forgiveness.

4 Q Fair enough.

5 Do you know how many of the pages in that book relate
6 to photo ID?

7 A I don't know specifically how many of them relate to
8 photo ID.

9 Q I don't know if we have Plaintiffs' Exhibit 155
10 loaded. Well, actually before I bring this up, let me ask
11 you, you said that you thought the provisional notice that
12 was in place in 2015 had directions for how to get a free
13 ID?

14 A I believe so, yes.

15 Q What about the one for 2014?

16 A I can't guarantee on that one. I specifically
17 remember someone bringing to my attention that you needed
18 to have it, and we included it in there. So I don't know
19 the timeline fully on that.

20 Q If I showed you a copy of that, would that refresh
21 your recollection?

22 A Perhaps.

23 MR. KAUL: This is going to be Plaintiffs' Exhibit
24 155 at Page 26.

25 THE COURT: When you say "a copy of that," a copy of

1 what?

2 MR. KAUL: Thank you, Your Honor. The 2014
3 provisional voter notice.

4 THE COURT: Okay.

5 MS. HART: I have no objection, Your Honor.

6 THE COURT: All right. It will be received.

7 (Plaintiffs' Exhibit 155 is received.)

8 BY MR. KAUL:

9 Q What page did I give you? Sorry. On the bottom
10 there should be a page number.

11 A It is VSBE 0045909.

12 Q All right. And it's up on the screen now, too. Does
13 that appear to you to be a copy of the notice that was
14 used, at least in 2014?

15 A I -- it's hard to tell based on the revision number
16 down at the bottom. But I think that revision numbers are
17 one of those things where you will update a document, and
18 whether or not the revision of it really gets changed, I
19 worry about that.

20 Now, to let you know, this document did not
21 previously --

22 Q Well, let me ask you, and direct your attention to
23 the middle. Do you see where it indicates that this
24 relates to photo ID, specifically?

25 A Yes.

CROSS-EXAMINATION OF MYRON MCCLEES

962

1 Q So this must have been for at least the first photo
2 ID election, right?

3 A I would imagine so. I would imagine so.

4 THE COURT: If he doesn't know, he doesn't know. He
5 said a couple times that he's unsure.

6 MR. KAUL: He did, Your Honor. And I thought maybe
7 looking at that part of the document might help him.

8 THE COURT: All right. That's fair.

9 A There's things that would lead me to believe that
10 this would be after the passage of 1256 based on the
11 acceptable forms of identification. Within there, it's
12 only listing photo IDs. It doesn't list, you know, a
13 current utility bill, bank statements. So I think this is
14 based on the 1256 standard as opposed to the SB1
15 standards. And that would lead me to believe that, yes,
16 this would be one that was after the passage of 1256.

17 Q Okay. And just so we're clear, 1256 is the 2013
18 voter ID law?

19 A Yes, sir.

20 Q And SB1 is the 2012 law?

21 A Yes, sir.

22 Q And so this does not indicate how a voter can get a
23 free ID, does it?

24 A Correct.

25 Q You were asked on direct about some outreach you've

CROSS-EXAMINATION OF MYRON MCCLEES

963

1 conducted. Do you recall that?

2 A Yes.

3 Q And you said you spoke to the Hanover NAACP, is that
4 right?

5 A Yes, at some point.

6 Q Now, they asked you to come out to speak to them,
7 right?

8 A Yes. Well, they -- if I can correct?

9 Q Please.

10 A They stated that they were going to -- the registrar
11 stated that she was going to be meeting with the NAACP,
12 and we volunteered to come help. So she wasn't requesting
13 our presence, specifically.

14 Q Do you remember being asked about that topic in your
15 deposition?

16 A Yes.

17 Q Go ahead.

18 A That's just it.

19 Q Do you remember what you said about that?

20 A No, I don't remember, specifically.

21 MR. KAUL: Could we pull up Page 41, Line 22.

22 THE COURT: Of what?

23 BY MR. KAUL:

24 Q This is your deposition transcript, is that right?

25 THE COURT: Where is that going to be found in the

CROSS-EXAMINATION OF MYRON MCCLEES

964

1 record? Does it have an exhibit number?

2 MR. KAUL: We were going to do the admission
3 separately. I was just using this to refresh -- to
4 impeach.

5 THE COURT: Okay. You're going to use it for
6 refreshment. All right. You can use it for past
7 recollection revived.

8 MR. KAUL: Thank you, Your Honor.

9 THE COURT: Mr. McClees, read over the document and
10 see whether or not that refreshes your recollection.

11 MR. McCLEES: Yes, it does.

12 THE COURT: It does?

13 MR. McCLEES: Yes, Your Honor.

14 THE COURT: He's prepared to respond. Go ahead.

15 A Yes, I'm looking at the deposition. Do you have a
16 question on that, sir?

17 Q And the NAACP had asked you to come speak, right?

18 A Well, in this period I said they ask me to come
19 speak. But it was actually the NAACP asked the general
20 registrar to come and speak, and the registrar contacted
21 us, and then I went and spoke and the NAACP introduced me.
22 So, yes.

23 Q I see. And so was the Department of Elections doing
24 affirmative outreach to minorities groups?

25 A I wasn't the person in charge of voter outreach, but

CROSS-EXAMINATION OF MYRON MCCLEES

965

1 we hired a person to specifically do an outreach, and I
2 think that they were contacting organizations.

3 Q But you weren't involved in that?

4 A Well, when we went to Virginia Organizing in
5 Charlottesville, that was specifically at the behest of
6 the person who was in charge of that who wished to bring
7 me along.

8 Q And you mentioned discussions at some churches, or
9 outreach at some churches?

10 A It was just a letter. I never went to the churches.

11 Q So you didn't go to churches?

12 A No.

13 Q Okay. Do you recall talking a little while ago about
14 Megan Cotten?

15 A Yes. Yes.

16 Q And how did her situation come to your attention?

17 A It was through an e-mail. And if I remember
18 correctly with the e-mail chain, she had contacted the
19 Secretary of the Commonwealth, the Secretary of the
20 Commonwealth had contacted Edgardo Cortes, and then I
21 believe Edgardo Cortes --

22 THE COURT: You need to speak a little more slowly so
23 she can take it down.

24 MR. MCCLEES: My apologies, madam.

25 It's just I always speak too quickly.

CROSS-EXAMINATION OF MYRON MCCLEES

966

1 A It was Secretary -- she had contacted the Secretary
2 of the Commonwealth, is my understanding. The Secretary
3 of Commonwealth contacted our agency, and then our agency,
4 Edgardo Cortes, contacted me and asked me to reach out to
5 her.

6 MR. KAUL: And I'm going to ask for Plaintiffs'
7 Exhibit 94 to be brought up.

8 BY MR. KAUL:

9 Q That's up on the screen there. And I can get you a
10 hard copy, too. Would that be helpful?

11 A The electronic would be perfectly fine, sir.

12 Q Okay. And this is a document that goes through three
13 pages.

14 MR. KAUL: If we can just click through those quickly
15 so he can see them all. All right. And then go back to
16 the first page.

17 BY MR. KAUL:

18 Q So is this the e-mail string that you were involved
19 in regarding Ms. Cotten?

20 A Yes, sir, it is.

21 MR. KAUL: And, Your Honor, we will move that this be
22 admitted as Plaintiffs' Exhibit 94.

23 THE COURT: Any objection?

24 MS. HART: No, Your Honor.

25 THE COURT: Received.

CROSS-EXAMINATION OF MYRON MCCLEES

967

(Plaintiffs' Exhibit 94 is received.)

1 BY MR. KAUL:

2 Q Now, this circumstance came to your attention because
3 she had first reached out to Mr. Stoney?

4 A Yes.

5 Q When voters have issues with provisional ballots
6 generally, are the poll workers instructed to raise those
7 issues to your attention, or was this an unusual
8 situation?

9 A Poll workers aren't asked to bring -- well, it
10 depends on what your definition of poll worker is. We use
11 very precise terms in Virginia.

12 Q I think you said election officer.

13 A Officers of Election. So, Officers of Election are
14 going to -- first of all, if it comes to a regular Officer
15 of Election, they're going to consult their chief Officer
16 of Election. And if their chief Officer of Election can't
17 handle that situation, they would contact their general
18 registrar, and then their general registrar might contact
19 me on election day.

20 When it comes to voters, voters often are going to
21 immediately contact the -- at that time, the Department of
22 Elections, and then from there it goes through the phone
23 call tree that I was talking about before, and then it
24 could reach me.

CROSS-EXAMINATION OF MYRON MCCLEES

968

1 Q Let me ask you about another document. I'm doing to
2 direct your attention back in time to the 2012 voter ID
3 law that was in place.

4 A Sure.

5 MR. KAUL: Let's look at PX 68.

6 THE COURT: Is that your exhibit or a defense
7 exhibit?

8 MR. KAUL: Plaintiffs. Your Honor, and I keep saying
9 PX. I apologize. I'll be clearer.

10 And let's show the second page so he can see the full
11 document.

12 BY MR. KAUL:

13 Q Now, do you recognize this?

14 A Yes, I do.

15 Q And this is an e-mail exchange that you were involved
16 in. And the last e-mail was sent by you, right?

17 A Yes.

18 Q Who is Susan Lee?

19 A Susan Lee is my direct manager.

20 Q And how would you pronounce that first word in your
21 e-mail?

22 A "Woooooooooooo."

23 Q So you were excited, it's fair to say?

24 A Certainly. Certainly.

25 Q So the implementation of the 2012 ID law went well,

CROSS-EXAMINATION OF MYRON MCCLEES

969

1 is that right?

2 A Compared with disastrous scenarios we've been
3 presented before that, certainly.

4 Q And then a few months later, the legislature changed
5 the law, right?

6 A That's correct.

7 Q You were mentioning before some issues that were
8 brought to your attention on election day in 2014 and
9 2015?

10 A Yes.

11 MR. KAUL: Let's bring up Plaintiffs' Exhibit 96.

12 Actually, before we discuss this, Your Honor, I'd
13 move that 68, Plaintiffs' 68, be admitted. That was the
14 one we just discussed.

15 THE COURT: If you feel it has value, I'll admit it.

16 MR. KAUL: I do, Your Honor.

17 THE COURT: Okay.

18 MR. KAUL: And I'll have Ms. Schultz just briefly
19 walk you through 96 here. Can we just flip to the next
20 couple pages. Thank you.

21 BY MR. KAUL:

22 Q And do you recognize that one as well?

23 A I remember from the depositions. So, yes.

24 Q Okay. And going back to the first page, this is an
25 e-mail that you sent, right?

CROSS-EXAMINATION OF MYRON MCCLEES

970

1 A Yes.

2 Q And this relates to one of the complaints that you
3 received on election day in 2014, right?

4 A Yes. Well, yes, it was received by Chesterfield, if
5 I'm not mistaken. And then I responded about it, yes.

6 MR. KAUL: Let's go to Page 2 of that document.

7 BY MR. KAUL:

8 Q The complaint you received was that -- related to
9 whether voters could use electronic forms of ID to vote,
10 right?

11 A Correct.

12 Q And what's the rule in Virginia?

13 A The rule in Virginia is that you need to provide a
14 form of an identification document.

15 Q A hard copy?

16 A Correct.

17 Q So if you have something electronically, you could
18 print it out, and you walk in with that, can you use that?

19 A Not initially, no.

20 Q What do you mean by that?

21 A I mean, the -- that wouldn't entitle you to a regular
22 ballot at that point in time because it's not the original
23 document. You need to provide the original document when
24 you're entitled to a regular ballot.

25 MR. KAUL: And, Your Honor, we move that 96 be

1 admitted.

2 THE COURT: Now, you identified this as a document
3 you saw at the deposition. Do you have any other
4 recollection of it?

5 MR. MCCLEES: No. I just remember it from the
6 deposition.

7 MR. KAUL: May I ask a follow-up, Your Honor?

8 THE COURT: Yes. Go ahead. If you think it's of
9 value, go right ahead.

10 MR. KAUL: Just briefly.

11 BY MR. KAUL:

12 Q The top of the first page. This is an e-mail that
13 you sent, right?

14 A It certainly looks that way.

15 Q You don't have any doubt about that?

16 A I have no doubt.

17 MR. KAUL: Your Honor, we would move this one in.

18 THE COURT: All right, sir.

19 (Plaintiffs Exhibit 96 is received.)

20 BY MR. KAUL:

21 Q All right. I'd just briefly like to ask you about a
22 couple of the What-If guides you discussed before.

23 A Sure.

24 MR. KAUL: And let's bring up Plaintiffs' Exhibit 61.

25 BY MR. KAUL:

CROSS-EXAMINATION OF MYRON MCCLEES

972

1 Q You talked before about the most recent What-If
2 guide?

3 A Yes.

4 Q All right. And does this appear to be the first of
5 several pages of the 2010 What-If guide?

6 A Judging from the revision date, yes.

7 MR. KAUL: I'm not sure if there's an objection to
8 this one or not?

9 MS. HART: No objection, Your Honor.

10 THE COURT: Be received.

11 MR. KAUL: Thank you, Your Honor.

12 (Plaintiffs' Exhibit 61 is received.)

13 BY MR. KAUL:

14 Q Now, you used that as a base for future What-IF
15 guides that you prepared, right?

16 A Correct. I joined the agency in 2011, so the What-If
17 guide certainly preceded me. So when I joined the agency
18 and I was starting to update this, I certainly would have
19 used versions that were previously available.

20 Q Let me next show you Plaintiffs' Exhibit 57. And
21 this is a What-If guide from 2012, is that right?

22 A Yes, sir. It looks that way.

23 MR. KAUL: Unless there's any objection, I'll move in
24 Plaintiffs' Exhibit 57.

25 THE COURT: Any objection, Ms. Hart?

CROSS-EXAMINATION OF MYRON MCCLEES

973

1 MS. HART: No objection.

2 THE COURT: Be received.

3 (Plaintiffs' Exhibit 57 is received.)

4 BY MR. KAUL:

5 Q And the point I'm getting to with these, and I'm not
6 going through each of these guides in detail, but as
7 additional laws have been passed, these What-If guides
8 have become increasingly complex, right?

9 A Well, I don't know if I can state "*complex*" because
10 sometimes we take information out, and so that would -- in
11 some situations it simplifies it. I will say that I don't
12 know if I can agree with the word "*complex*," sir.

13 Q Okay. As more voter ID laws have been passed, you've
14 added information about --

15 A I would state it's become more comprehensive. But
16 as far as being more complex, I don't believe it asks them
17 to do things that are -- there are some things in the
18 election's world that are complex. I don't believe this
19 fits into being complex with this. Just my personal
20 opinion.

21 Q Okay. So when you say "*comprehensive*," you mean
22 there's more information there?

23 A Sure. Certainly.

24 Q You were asked about the debate regarding voter ID
25 legislation?

CROSS-EXAMINATION OF MYRON MCCLEES

974

1 A Yes, sir.

2 Q And I think you mentioned that one supporter had
3 mentioned some case of fraud?

4 A That would be Senator Garrett. I remember him
5 talking specifically, you know --

6 THE COURT: Senator Gary or Senator Garrett?

7 MR. MCCLEES: Garrett. My apologies, Your Honor.

8 BY MR. KAUL:

9 Q And the case he discussed was not a case of voter
10 impersonation fraud, was it?

11 A I have no clue. I was just listening in the crowd,
12 and he stated that he had prosecuted cases of voter fraud.
13 That stood out in my mind because that was the first time
14 I'd heard of somebody saying that they had prosecuted
15 cases of voter fraud like that.

16 Q Do you remember if he was talking about vote buying?

17 A I haven't the slightest of what he was referring to.

18 THE COURT: Is your office involved in criminal
19 investigations of voter violations?

20 MR. MCCLEES: No, sir, we are not. We are not an
21 investigatory agency.

22 THE COURT: Okay.

23 BY MR. KAUL:

24 Q Now, there were a number of groups that spoke out in
25 opposition to the voter ID bill, correct?

CROSS-EXAMINATION OF MYRON MCCLEES

975

1 A Yes.

2 Q And that includes the League of Women Voters?

3 A Yes, sir.

4 Q And former State Board of Elections Secretary, Mike
5 Brown?

6 A Yes. Yes. I don't remember him specifically from
7 the Senate meetings, but I remember him making his case
8 known at the NAACP meetings, certainly.

9 Q And the NAACP also opposed that law?

10 A That is correct, sir. Yes.

11 Q And that was in the hearings?

12 A Yes. I remember them coming to the hearings. Yes,
13 sir.

14 Q And what were the concerns that those groups were
15 raising?

16 A They were raising concerns about persons that didn't
17 have ID. They were raising concerns that there was no
18 provable instances of voter impersonation fraud. They
19 were raising concerns about students. They were raising
20 concerns about people being able to traverse to get the
21 IDs. They were raising multiple concerns.

22 Q And the supporters said -- responding to those
23 concerns by saying what?

24 A They were stating that, you know, why not make the
25 process harder. They were also stating that because we

CROSS-EXAMINATION OF MYRON MCCLEES

976

1 didn't have the mechanism to detect whether fraud was
2 taking place or not, we didn't know if fraud was taking
3 place.

4 Q And did they claim that everybody had an ID?

5 A I think they would intimate that. I don't know if
6 they specifically said those words. But they were
7 certainly stating that, you know, I have an ID, all these
8 other people have driver's licenses, and things.

9 Q And you said the debate was highly partisan, is that
10 right?

11 A Sure. Sure.

12 Q And you said the Democrats were opposed and the
13 Republicans supported it?

14 A I thought it was quite plain.

15 Q I want to ask you about the adoption of the rule
16 regarding expiration dates.

17 A Okay.

18 Q And I sort of want to walk you through the timeline
19 and make sure we've got the details right. So when this
20 bill passed, "*this bill*" meaning the 2013 voter ID law,
21 the staff at the State Board of Elections had
22 communication with the board members about their view as
23 to what the expiration date rules should be, right?

24 A No, sir. Well, when you say "*should be*," or are you
25 stating as what our current guidance was, or what we

CROSS-EXAMINATION OF MYRON MCCLEES

977

1 personally believed it should be, or professionally
2 believed it should be? Because I don't inform the
3 Board -- I didn't inform the Board on, you know, what my
4 opinion was on what it should be. I work at the will of
5 the Board.

6 So I would state what I believe the current standard
7 was, what our current standard was, our lack of statutory
8 basing on that. I would inform the Board of that. But I
9 did not give a recommendation on what it should be.

10 Q Let me ask, did you inform the Board members of what
11 your practice had been prior to the law?

12 A Yes, sir.

13 Q And what was that?

14 A It accepted unexpired IDs, or expired within the
15 previous 30 days.

16 Q Okay. And so that was the practice before the 2013
17 bill was passed?

18 A Yes, sir.

19 Q And Board Member Bowers and Mr. Judd agreed that that
20 time frame should be expanded, right?

21 A That is correct.

22 Q And based on their guidance, you proposed draft
23 language that would have permitted all expired IDs to be
24 used for voting?

25 A That is correct.

CROSS-EXAMINATION OF MYRON MCCLEES

978

1 Q All right.

2 MR. KAUL: And let me bring up Plaintiffs' Exhibit 140. And then let's take a look at the second
3 page.

4 BY MR. KAUL:

5 Q Do you recognize this document?

6 A Yes, I do. This is a draft of 20-40-10, sir.

7 Q Okay. And this talks about valid meaning voter ID
8 that means documents that appear to be genuinely issued by
9 the agency, or the agency are issuing entity. Do you see
10 that?

11 A Yes.

12 Q And so this draft language that was prepared has no
13 reference to an expiration date, right?

14 A Correct.

15 Q And subsequent to this, there was language added that
16 specifically spelled out that an expiration date was not
17 relevant, right?

18 A Yes, sir.

19 Q Okay. And the Board adopted a policy that said that
20 expiration dates were not relevant, right?

21 A That's correct, sir.

22 Q Now, that changed, right?

23 A Yes, sir.

24 Q And it's your understanding specifically that people

CROSS-EXAMINATION OF MYRON MCCLEES

979

1 who worked with Senator Obenshain approached Chairman Judd
2 because they were unhappy about the regulation, right?

3 A I don't know who contacted who. I was not privy to
4 that specific information. I was just made know that
5 Chairman Judd switched his opinion. I didn't know exactly
6 how he was contacted, or anything. But it was definitely
7 something that I was alerted to when I came back from
8 Brazil.

9 MR. KAUL: And I want to come back to that in a
10 minute.

11 Your Honor, I move that Plaintiff's Exhibit 140 be
12 admitted. That's the document that shows the draft
13 regulation.

14 THE COURT: I have no objection. It's an uncontested
15 point. I mean, it's not even an issue here. But if you
16 want it in evidence, I will put it in there. I mean, my
17 goodness.

18 I assume there's no objection?

19 MS. HART: No objection, Your Honor.

20 THE COURT: Okay.

21 Very marginally relevant.

22 (Plaintiffs' Exhibit 140 is received.)

23 BY MR. KAUL:

24 Q All right. So do you recall being asked in your
25 deposition about why the regulation changed?

CROSS-EXAMINATION OF MYRON MCCLEES

980

1 A Yes.

2 Q Okay. And do you recall saying that you learned that
3 Chairman Judd has been approached by Obenshain's people?

4 A I might have said that. Sure. Certainly.

5 Q Well, let's see if you look at your deposition if it
6 refreshes your recollection.

7 A Sure.

8 MR. KAUL: Can we pull up Mr. McClees' deposition
9 transcript. And it's Page 119.

10 BY MR. KAUL:

11 Q And let me ask you to read through Lines 4 to 24, and
12 see if that refreshes your recollection.

13 A Okay. Thank you.

14 Okay. Yes. Yes.

15 Q And so it is your understanding that Senator
16 Obenshain's -- I guess his staff approached Chairman Judd?

17 A Yes.

18 Q Is that right?

19 A Yes.

20 Q And Senator Obenshain then sent a letter to the Board
21 as well indicating that he was criticizing the regulation,
22 is that right?

23 A I don't know, specifically. If you give me a -- I'll
24 be more than happy to -- if you can refresh my memory,
25 I'll be more than happy to look at that.

CROSS-EXAMINATION OF MYRON MCCLEES

981

1 Q That's okay. After at least that meeting, or that
2 meeting that we were just discussing, the Board did in
3 fact issue a new proposed regulation, right?

4 A That is correct. Yes.

5 Q All right. And this one, rather than allowing all
6 expired licenses, the proposed regulation would only allow
7 licenses that had been expired for 30 days, is that right?

8 A I don't remember the specific date. If you have an
9 exhibit, I would love to have my memory refreshed on that.
10 I remember that it was something that was less than a
11 year, and certainly was -- it was between a year and
12 infinity.

13 Q Okay. And that was after the Board had originally
14 made clear that an expiration date was irrelevant?

15 A Yes. That's correct. Yes.

16 Q Now, you were talking about the number of comments
17 you received on this new proposed regulation?

18 A Absolutely. Yes.

19 Q And it was something like 600, right?

20 A I remember it was around 500. It might have been up
21 to 600. But I know it was a heck of a lot more than I was
22 used to. Yes, sir.

23 Q And let me show you --

24 MR. KAUL: Can we bring up on the screen Plaintiffs'
25 Exhibit 152. And I'm just going to ask Ms. Schultz to

CROSS-EXAMINATION OF MYRON MCCLEES

982

1 sort of scroll through this very briefly.

2 BY MR. KAUL:

3 Q But does this appear to you to be the set of comments
4 that you received?

5 A Yes, sir, it does.

6 MR. KAUL: And, Your Honor, this is Plaintiffs'
7 Exhibit 152, which I would move into evidence.

8 THE COURT: Any objection?

9 MS. HART: Your Honor, I think there's some clear
10 hearsay issues with it.

11 THE COURT: Well, I don't think it's offered for
12 anything other than the fact that he received this. The
13 truth of the matter is really not at issue. The question
14 here is whether or not he received that language via that
15 particular document.

16 The objection is overruled. It will be admitted.

17 (Plaintiffs' Exhibit 152 is received.)

18 BY MR. KAUL:

19 Q Did the significant majority of the comments you
20 received oppose reducing the period of expiration?

21 A Absolutely. Absolutely.

22 Q Have you ever received nearly so many comments on a
23 regulation?

24 A Not at this time. Certainly, not.

25 Q What would you typically do when you get comments on

CROSS-EXAMINATION OF MYRON MCCLEES

983

1 a regulation to prepare the Board for its meeting?

2 A Normally, not only would I do this sort of table with
3 the raw input -- normally, I would go through each and
4 every single comment and pull out every issue lodged, and
5 then create a table of how many instances of that argument
6 were made.

7 Q Did you do that here?

8 A No, I did not.

9 Q Why not?

10 A Because the turnaround time between the closing of
11 the comment period and the hearing of the Board was so
12 close that I didn't have time to sift through these and do
13 that sort of issue spotting.

14 Q And was this an unusually fast process?

15 A I would say so, yes.

16 Q And why was -- do you know why the Board was trying
17 to move quickly with this?

18 A I haven't the slightest.

19 Q Let me ask you about another document, Plaintiffs'
20 Exhibit 145. And let's start on -- well, you see at the
21 bottom of the first page there's an e-mail from you to
22 Susan Lee and Mr. Cortes?

23 A Yes. I see.

24 MR. KAUL: Okay. Let's turn to the second page.

25 BY MR. KAUL:

CROSS-EXAMINATION OF MYRON MCCLEES

984

1 Q And this is the body of that e-mail, is that right?

2 A I believe so. Yes, sir.

3 Q I mean, you raise some questions for your colleagues
4 in this e-mail?

5 A Yes. Yes.

6 Q All right. And the first one was what to do with
7 people who had a religious objection to having their
8 photograph taken?

9 A Yes.

10 Q Is there an exception to the voter ID law that allows
11 -- that deals with the circumstances for people to have
12 religious objections to being photographed?

13 A Not within 24.2-643(b). No.

14 Q So can people who have a religious objection to being
15 photographed vote in person in Virginia?

16 A Not that I'm aware of.

17 Q The only option they have available is to vote
18 absentee?

19 A Yes. That's my understanding.

20 Q You also raised an issue about what happens if a
21 person's name changes from what's on their ID?

22 A Can I say something on the original -- your previous
23 question?

24 Q Sure.

25 A There is a photo ID chart that states that Tribal

CROSS-EXAMINATION OF MYRON MCCLEES

985

1 enrollment IDs are acceptable. And I don't know what
2 those have on them. So theoretically, if one of the
3 acceptable Tribes doesn't have a photo ID, it might be
4 able to be shoehorned in. But I've never come across that
5 situation or know the statutory backing based on it. It
6 was just something that preexisted.

7 Q Okay. Just to be clear, the law that passed in 2013
8 requires all IDs that are used to vote to have a
9 photograph on them, right?

10 A What it does is it gives you a list of acceptable
11 forms of identification. And all those acceptable forms
12 of identification have a photo upon them. But it is my
13 understanding that it doesn't state that only -- it
14 doesn't state photo IDs -- it is my understanding that it
15 states -- it gives a list of IDs, and all the IDs that it
16 lists contain photographs upon them. So it's a little bit
17 different.

18 Q Okay. And the statute will speak for itself on that
19 point?

20 A Absolutely.

21 Q So other than that circumstance with the possibility
22 of Tribal IDs, a voter with a religious exception can't
23 vote in-person?

24 A Yes, sir.

25 Q All right. Now, the second issue you raised in this

CROSS-EXAMINATION OF MYRON MCCLEES

986

1 e-mail was what happens with a person who has changed
2 their name?

3 A Yes.

4 Q So, for example, if a couple gets married and they
5 have the same last name following the marriage, but the ID
6 has the old last name, this is the type of circumstance
7 you're talking about?

8 A Yes, I believe so. Yes.

9 Q So did you resolve this issue? What happens?

10 A I believe that Cameron created a document based on
11 this. And I don't know if it ever got final approval and
12 went out. But I know that Cameron was certainly concerned
13 with this sort of situation.

14 Q So what happens now if a voter shows up at a poll
15 with -- you know, say, a couple gets married and the woman
16 changes her name and she's got her old last name on the
17 license, but the voter roll has her married name, what
18 happens?

19 A Sure. The standard -- the underlying standard has
20 changed as of July 1, 2015. Delegate, I want to say,
21 Watts, introduced a bill saying that if the name is
22 substantially similar to the name within the poll book,
23 that it can be accepted. So now that "*substantially*
24 *similar*" is the standard, what that means to a person
25 actually checking the polls, you know, an Officer of

McClees - cross

987

1 Election in a polling place, I don't know. But it is the
2 standard now.

3 Q But so if my name were Kaul and I got married and it
4 became McClees, that's not substantially similar, right?

5 A Not in my opinion. But once again, it's left in the
6 hands of an Officer of Election.

7 Q Okay. So those people who changed their name, but
8 have the old name on their ID, they can't vote under that
9 old name unless it's substantially similar?

10 A Unless it's substantially similar in the eyes of an
11 Officer of Election.

12 THE COURT: Substantially similar to the name on the
13 voting roll, right?

14 MR. McCLEES: Yes, Your Honor.

15 THE COURT: Okay.

16 I think before you get into another topic, we're
17 going to take a 10-minute recess, okay?

18 MR. KAUL: Thank you, Your Honor.

19 (Recess taken.)

20 (Gil Halasz is now the court reporter.)

21 CROSS EXAMINATION (continued)

22 THE COURT: All right, you may continue.

23 BY MR. KAUL:

24 Q Could we bring that document back up that I was just
25 talking to Mr. McClees about?

1 I want to qualify a couple points on this. We were
2 talking about the religious objection and how somebody,
3 with the exception you noted could only vote absentee,
4 right?

5 A Yes.

6 Q But a voter has to have an excuse to vote absentee in
7 Virginia, right?

8 A That's correct.

9 Q There is no religious objection excuse?

10 A Yes, there is. Yes, sir, there is.

11 Q Can you tell me about that?

12 A I believe it is in -- I am not the absentee person
13 but I believe in 24.2-701, sir.

14 Q 24.2-701?

15 A 701.

16 THE COURT: Code of Virginia.

17 THE WITNESS: Yes, I believe in there. It is -- I
18 know it is within chapter 7 of title 24.2. And it
19 gives -- obligation occasioned by my religion. So it is
20 within there. So we have interpreted that to allow even
21 atheists who don't wish to venture into a church for a
22 polling place to assert an excuse for voting absentee.

23 BY MR. KAUL:

24 Q Okay.

25 There is language that says that a voter can vote

1 absentee because of an obligation due to their religion?

2 A Right.

3 Q And you have interpreted that in that religious
4 objectors to being photographed can vote absentee?

5 A Right.

6 Q Okay.

7 So, but that is, other than the tribal exception, the
8 only way to vote?

9 A Yes, sir.

10 Q And do voters have to mark the reason they are being
11 excused, their excuse for voting absentee?

12 A Yes. Yes, they do, sir.

13 Q Do you inform voters about that option to mark that
14 box to vote absentee?

15 A What do you mean by "inform voters," sir?

16 Q Do you do out reach to tell religious objectors they
17 can vote absentee that way?

18 A Oh, no. No. My apology. I am not the person who
19 handles absentees, so I am not aware of any out reach.

20 Q Okay.

21 You have received questions about religious
22 objectors, right. E-mail?

23 A In a hypothetical sense. I have yet to receive
24 anything specifically that I can remember from a person
25 who actually said, I object to being photographed. So it

1 always comes from groups who are asking questions, well,
2 what if? But I don't remember specifically somebody
3 saying, hey, I am not going to take a photograph, or I'm
4 not able to take a photograph. I don't remember that sort
5 of thing happening.

6 Q Any of these groups that advocate on behalf of
7 voters, right?

8 A Absolutely, yes.

9 Q And so could we go back to the first page of this
10 e-mail?

11 Let's zoom in on your e-mail to Mr. Edgardo Cortez.
12 Do you see here you say, "You are free at any time to meet
13 on both this and the Obenshain letter?"

14 A Yes.

15 Q Does that refresh your memory from before about
16 whether Senator Obenshain's letter regarding the
17 definition of what a valid ID is?

18 A No. Because, if that -- is this before the World
19 Cup? Looking at the date, this is June 16, so this is
20 before I left. I don't remember specifically addressing,
21 speaking about a letter from Senator Obenshain before I
22 left. Because I remember when I came back I was caught a
23 little bit unaware. At least that is what I think I
24 remember coming back and being kind of surprised a little
25 bit. Not too much, but surprised a little bit.

1 Q To be clear, you did send this e-mail?

2 A Sure, yes.

3 Q Your Honor, we move this be admitted as plaintiffs'
4 exhibit 145.

5 THE COURT: Any objection?

6 MS HART: No objection, Your Honor.

7 THE COURT: It will be received.

8 (Plaintiffs' Exhibit 145 was
9 offered and received in evidence)

10 BY MR. KAUL:

11 Q You were also talking about the volume of comments
12 you received on your regulation?

13 A Yes, sir.

14 Q Was there also an unusual volume of people speaking
15 at the legislature, members of the public speaking about
16 the voter ID law?

17 A For, I would say for the Privileges and Elections
18 Committee it ranked up there certainly.

19 Q You said the line went out the door, right?

20 A It was all the way down the aisle. Certainly all the
21 way down the aisle in the chamber. I want to say Senate
22 chamber A. It was a long line of people, certainly.

23 Q Most of those people were expressing their opposition
24 to the voter ID bill, right?

25 A I would say that is what my recollection was.

1 Q You said that is what your recollection --

2 A That is what my recollection is, yes, sir.

3 Q We were talking before about the change to the
4 definition of "valid." And we discussed expiration date
5 and the 30-day limit. Ultimately the board adopted a rule
6 that allowed for identifications to be expired for up to
7 one year if they were going to be used for voting; is that
8 right?

9 A Yes, sir.

10 Q That is not the recommendation that the staff of your
11 agency had provided, right?

12 A Well, it is, again, when it comes to recommendation,
13 if I did not specifically recommend something based on my
14 analysis, I work at the will of the board, so my input to
15 the board was, here is what we have been operating under.
16 Then it was, we are going to go no expiration. And then
17 after that, I made no recommendation on a specific time
18 period. So, it is not like I used my professional
19 analysis to provide something. I was just working at the
20 will of the board.

21 Q Were you present at the meeting when the board passed
22 that the final regulation, the one that --

23 A Yes, I was at that one, yes.

24 Q And Kimberly Bowers, who is one of the three board
25 members, was not present, right?

1 A That's correct.

2 Q And she is the Democratic appointee to the board, is
3 that correct?

4 A Yes. She was vice chair.

5 Q Is it unusual for the board to have meetings with
6 members absent?

7 A With that board I don't remember meetings with -- I
8 don't remember a lot of meetings without other members.
9 And I think the current board, they have had situations
10 where they have met without a member present. But I don't
11 remember multiple meetings with members not present then.

12 Q Is the only one you remember with the board involving
13 Chairman Judd, Ms. Bowers, Mr. Palmer, in which a board
14 member was missing, the one when the definition of "valid"
15 changed; is that right?

16 A It is the one that stands out, I would say, but I
17 can't guarantee that there weren't others. It is one that
18 I certainly remember. It is one that I remember, but I
19 cannot speak assuredly that there weren't others, but it
20 certainly stands out.

21 Q I want to ask you a couple quick questions about the
22 implementation of the voter ID rules.

23 A Yes, sir.

24 Q A voter -- an employer ID to be used for voting has
25 to be issued in the ordinary course of business, right?

1 A Yes.

2 Q You are smiling. Why is that?

3 A Because we get multiple questions from people on this
4 situation. For instance, realtor business card. And, you
5 name it, we get all kinds of questions from people.
6 Normally it is from registrars who like to pepper me with
7 hypotheticals. But, yes, we even have people say, if a
8 person runs their own company and, you know, they are
9 self-employed and they issue themselves an ID. So, I
10 mean, I get all kinds of questions on it. It is a sticky
11 wicket.

12 Q What guidance do you give on that sticky wicket?

13 A I say in the ordinary course of business where it is
14 normal to provide an ID, and it isn't just being produced
15 solely for this sort of situation, and it is not -- and
16 the purpose is to identify that person to an employer as
17 opposed to for public purposes. Whereas, you know, a
18 realtor business card is for me, if I were a realtor for
19 me to introduce myself to a general person, a client, or
20 something. Not for me to introduce or to prove my
21 identity to my employer.

22 Q So I can't use my realtor business card?

23 A I have never given official guidance on this, but it
24 would be something that I would lean towards not,
25 probably.

1 Q And the registrar is sort of told to do whatever they
2 think is right, or how does that work?

3 A We -- normally what we will do is, if they ask for
4 official guidance, we will provide official guidance. If
5 they ask for -- if they call me up and ask for my general
6 opinion on that one, I would probably punt, and say, it is
7 one I probably wouldn't normally think would fit, but I
8 leave it in your discretion. That is the sort of
9 situation.

10 Q Is it possible if I live in Fairfax County I can use
11 my realtor ID to vote, but if live in Arlington I can't?

12 A Without official guidance specifically issued by our
13 agency, yes, it would be a little bit of gray area, sure.

14 Q Now, out-of-state driver's licenses issued by state
15 governments. I can't use those, right?

16 A That's correct.

17 Q And a license issued by the DMV in Virginia, if it
18 has been expired a year and a day, I can't use that,
19 correct?

20 A Correct.

21 Q How does the reasonable resemblance part of the ID
22 process work?

23 A It is left in the discretion of the officers of
24 election in the polling place. So, I think all of --
25 well, not all -- but the great majority of the standards

1 within our Title 24.2 are based on a community standard
2 where your neighbors are the ones who are vetting you,
3 quote unquote, vetting you. So it is kind of based on
4 that notion, idea, that your neighbor is the one who is
5 checking you out.

6 So, in that situation when you go up, if you present
7 ID they don't think you resemble, they give you the
8 opportunity to direct you towards the provisional voting.

9 Q Why do you have that community standard you have been
10 describing?

11 A It has just been a part of the code for, you know,
12 certainly preceded me. But it is something that is a very
13 integral part of our process.

14 Q Is it the idea your neighbors are more likely to know
15 who you are than --

16 A I think so. The reason why the school year lets out
17 in summer, so you can go harvest.

18 THE COURT: Let's move on here.

19 BY MR. KAUL:

20 Q I want to get to your neighbors are more likely to
21 know you than the general registrar, right?

22 A Theoretically, yes, sir.

23 Q So if I show up to the polls and the poll worker says
24 I don't reasonably resemble my ID, I can still cast a
25 provisional ballot, right?

McClees - cross

997

1 A Correct. Or if you have another ID that you
2 resemble, you can present that.

3 Q If I cast a provisional ballot I can cure that by
4 faxing an ID or e-mailing an ID, right?

5 A Yes, sir.

6 Q I could even use the same ID I wasn't allowed to vote
7 with to cure the ballot?

8 A Yes, sir, you could.

9 Q There is no way for the election worker to check when
10 I fax that if I resemble the person?

11 A No, sir, there isn't.

12 Q Instead I could vote absentee if I had an excuse
13 without any ID at all, correct?

14 A That's correct.

15 So long as there is HAVA involved there, but assuming
16 you have met those HAVA standards, yes.

17 Q No further questions.

18 THE COURT: Any redirect?

19 MS HART: Yes, sir.

20 THE COURT: All right.

21 REDIRECT EXAMINATION

22 BY MS HART:

23 Q A couple more questions for you, Mr. McClees.

24 The first one has to do with fraud. Fraud isn't
25 something that you normally handle. Is it voter fraud

1 specifically?

2 A No, it is not.

3 Q So if there were voter fraud issues that is not
4 something would come to your desk, typically?

5 A Not specifically. Sometimes people will ask us
6 questions about fraud. Or will try to ask us, give us a
7 scenario. We always refer those to the Commonwealth's
8 attorney.

9 Q Why is that?

10 A Because we are not an investigatory agency. We don't
11 have the mechanism in order to go out and check that sort
12 of thing.

13 Q And the Commonwealth's attorney does?

14 A Absolutely.

15 Q All right.

16 The next question has to do with provisional voter
17 notice. The 2015 version of the provisional voter notice
18 does advise the provisional voter about the free voter ID
19 option, correct?

20 A That is correct.

21 Q Do you have any reason to think that future versions
22 of that provisional notice would not contain that notice?

23 A Heavens, no.

24 Q When the 2013 law, SB 1256, was passed it included
25 additional forms of acceptable photo ID; is that right?

Davis - direct

999

1 A I believe so, yes.

2 Q And when you updated the What If guide, you included
3 those additional forms of photo IDs, right?

4 A Correct. After passage stage of 1256, yes.

5 Q I have no further questions.

6 THE COURT: Okay. May this gentleman be excused?

7 You are excused and free to go. Thank you for coming. We
8 appreciate your testimony.

9 THE WITNESS: Thank you.

10 (Witness stood aside)

11 THE COURT: Who will be your next witness?

12 MR. FINBERG: Defense calls Matthew Davis.

13 THE COURT: Mr. Davis. All right.

14 Mr. Davis, if you would raise your right hand, left
15 hand on the Bible, and face the Clerk of the Court.

16 MATTHEW JAMES DAVIS

17 WAS SWORN AND TESTIFIED AS FOLLOWS:

18 DIRECT EXAMINATION

19 MR. FINBERG: Could I ask the Court Security Officer
20 to give one copy of this binder to Mr. Davis?

21 THE COURT: Yes, sir.

22 MR. FINBERG: Then a copy for the law clerk and for
23 Your Honor.

24 THE COURT: All right.

25 MR. FINBERG: May I proceed?

Davis - direct

1000

1 THE COURT: Yes, sir, you may.

2 BY MR. FINBERG:

3 Q Thank you.

4 Good morning, Mr. Davis.

5 A Good morning.

6 Q Could you please state your full name for the record,
7 spelling the last name.

8 A Matthew James Davis. D-A-V-I-S.

9 Q Thank you.

10 Mr. Davis, can you briefly describe your educational
11 background since high school.

12 A Bachelor's in government, minor in astronomy, masters
13 in teaching from the University of Virginia.

14 Q Okay.

15 When did you obtain those different degrees?

16 A I graduated in the spring of 2000.

17 Q Where do you currently work?

18 A Department of Elections.

19 Q What is your job title at the Department of
20 Elections?

21 A Chief Information Officer.

22 Q Could you describe for the Court what your job duties
23 are as the Chief Information Officer at the Board of
24 Elections?

25 A I am essentially the information technology manager

Davis - direct

1001

1 for the department. I manage the statewide voter
2 registration system, which is also election management
3 system for the Commonwealth. As well as the campaign
4 finance disclosure application, and all of the IT needs
5 for the agency.

6 Q How long have you been in that position?

7 A Just over six years.

8 Q Mr. Davis, I am going to ask you some questions about
9 list maintenance guidelines. Can you briefly describe
10 what list maintenance guidelines are?

11 A Certainly. Under the National Voter Registration Act
12 state election offices are required to maintain voter
13 registration roles. And to do so we compare our data to
14 other trusted data sources, such as the National Change of
15 Address data from the Postal Service. The State Police
16 provide us felon data that we compare our data to. We
17 obtain data from the Bureau of Vital Statistics, from the
18 Department of Health for death records, as well as from
19 Social Security Administration and as other sources along
20 those lines. We also participate --

21 Q Mr. Davis, I don't mean to interrupt. Could you
22 maybe slow down a little bit. We have a court reporter
23 here who has to take down your answers.

24 A All right.

25 Q I will remind you if I catch you speeding up again.

Davis - direct

1002

1 We would appreciate it if you would just slow down a
2 little bit.

3 A Certainly.

4 We also participate in several cross-state data
5 exchanges with other chief election officials in other
6 states to compare our voter registration records with the
7 registration records in those states.

8 Q Thank you.

9 You have got a binder in front of you, Mr. Davis.

10 If I could you to take look at what is tab 16.

11 Your Honor, that is Defendants' exhibit 326.

12 THE COURT: Okay.

13 THE WITNESS: I might not have the same tab numbers.

14 MR. FINBERG: Tab 16?

15 May I approach the witness, Your Honor?

16 THE COURT: Yes, sir.

17 MR. FINBERG: Let me call out the exhibit number.

18 Sorry.

19 THE COURT: I don't see 326 in my binder as well. I
20 do see, I am sorry.

21 MR. FINBERG: I think the issue is I have an earlier
22 iteration that doesn't have tabs, that have the exhibit
23 numbers. Mr. Davis has the exhibit numbers. So if I tell
24 you Defendants' exhibit 326. Can you find 326 on the tab?

25 THE COURT: Maybe the third from the end.

Davis - direct

1003

1 MR. FINBERG: Yes. I apologize for the confusion.

2 BY MR. FINBERG:

3 Q If I could ask you to look at this document and let
4 us know whether you recognize this?

5 A I do.

6 Q What is this document?

7 A This is the first report that our agency put out as
8 required by the Code of Virginia on our list maintenance
9 activities in the commonwealth.

10 Q Do you appear as an author of this document?

11 A I do.

12 MR. FINBERG: Your Honor, I would like to move this
13 document into evidence.

14 THE COURT: Any objection?

15 MR. KAUL: No, Your Honor.

16 THE COURT: It will be received.

17 (Defendants' Exhibit 326 was
18 offered and received in evidence)

19 BY MR. FINBERG:

20 Q What is voter regulation list maintenance activities?

21 A So this is where we compare our voter registration
22 list with other trusted data sources to insure the
23 accuracy of our data.

24 Q Are you personally involved in the list maintenance
25 activities?

Davis - direct

1004

1 A Yes.

2 Q If I could direct your attention to pages ten and
3 eleven of this exhibit.

4 Do you see the heading towards the bottom third of
5 the page, other list maintenance activities, identifying
6 moving voters?

7 A Yes.

8 Q What is the process that is described on page ten and
9 eleven?

10 A This is our activity related to comparing our data
11 with the national change of address data provided by the
12 Postal Service. Where at least once a year as required
13 under the National Voter Registration Act we match our
14 voter registration data to the change of address data with
15 the Post Office. When we find a match we then send a
16 mailer to the voter's registration address by forwardable
17 mail requesting that the voters confirm their registration
18 record with the commonwealth.

19 If the voter fails to respond to that notice within a
20 minimum of 30 days they will be moved from what is
21 considered an active registration status to inactive
22 registration status. Once --

23 Q What is the criteria then being moved from active to
24 inactive?

25 A So in this occasion it would be where a voter has

Davis - direct

1005

1 moved according to what they have self reported to the
2 Post Office and then failed to respond to our attempts to
3 contact them.

4 Q All right.

5 A Once they are in an inactive status if that voter
6 fails to update voter their registration record through a
7 new voter registration form change of address, or the
8 like, or if they fail to vote any time between the time
9 they moved to inactive and the next two federal elections,
10 which can span anywhere from two to four years depending
11 on the timing of the mailing, they would then be canceled.

12 Q What is the effect of classifying voters inactive?

13 A The voter is still eligible to vote in the election
14 as long as they show up to vote and provide proper
15 identification. And they do, I believe, have to sign a
16 statement of affirmation if they show up to vote
17 confirming that they are still registered at that
18 location, or still a resident at that location. There are
19 some varied exceptions to that depending on the type of
20 election I am not as well versed in.

21 Q Okay.

22 Essentially the moving of a voter from active to
23 inactive status, is it an accurate to say that has to do
24 with their participation in elections?

25 A Yes.

Davis - direct

1006

1 Q You can take that down.

2 Mr. Davis, are you familiar SB 1256?

3 A I am.

4 Q Do you have a general understanding as to the
5 substance of SB 1256?

6 A Yes. It was the bill that now requires voters to
7 provide proof of photo identification when they show up to
8 vote in person.

9 Q Was your department in charge of any out reach
10 efforts related to state bill 1256, or Senate bill 1256?
11 Excuse me.

12 A Yes.

13 Q What did your department do to assist in out reach
14 efforts regarding SB 1256?

15 A The department did several activities. They hired a
16 marketing firm to help coordinate advertisements, both
17 with radio, billboards and bus ads. We also participated
18 in social media out reach campaign where we leveraged our
19 Twitter and Facebook accounts to try to spread the word
20 about the photo ID requirements. And we also mailed
21 86,000, approximately, post cards to voters who we
22 identified did not have a DMV-issued photo identification
23 card notifying of the law.

24 Q Let me ask you about that mailing you just described.
25 Who were the intended recipients of that mailing?

Davis - direct

1007

1 A In that mailing they were voters, they were actively
2 registered voters, meaning had not been moved to inactive
3 status, who had done some sort of activity related to
4 their voter record, either having registered or updated
5 their registration, or having participated in elections
6 going back to including the November 2012 federal general
7 election.

8 Q How did you go about identifying the potential
9 recipients of that mailing?

10 A We compared our data to the Department of Motor
11 Vehicles data based off of social security number match.
12 In this instance where we did not find a match with the
13 Department of Motor Vehicles data, we assumed they did not
14 have a DMV-issued photo ID card. And in doing so, we
15 identified approximately 200,000 active voters that did
16 not appear to have a DMV-issued card. We then looked at
17 other sub-classes of voters, specifically individuals who
18 notified they were members of military, or individuals who
19 have a standing absentee status, absentee voting status
20 with us, which could be military, overseas, and in some
21 cases, disabled voters. In this case voters would be
22 voting absentee, and would not be voting in person. So
23 they would not need voter ID. We narrowed the window down
24 to about 86,000 voters that we did the mailing to.

25 Q So one of the criteria was possession of DMV ID?

Davis - direct

1008

1 A Correct.

2 Q I ask you to take a look at plaintiffs' exhibit 55.

3 PX 55.

4 A Okay.

5 Q Do you recognize this document?

6 A I do. It's a report we published on our web site in
7 the fall of 2014 outlining the counts by precinct of
8 active and inactive voters, and it also provided by
9 precinct the counts of active and inactive voters who did
10 not appear to have a DMV record. And then a final column
11 titled "filtered," which is that filtered criteria I just
12 described. A definition of the filtered criteria appears
13 on the final page. Page 40 at the bottom. That is where
14 it is voters who self-identified as being military,
15 overseas or federal only voter who does not have active
16 FPCA, federal positive card application, or 7031 absentee
17 application. Those are ongoing absentee voters. And also
18 who had a last activity date in our system, or had
19 participated in elections going back to the last
20 presidential, which would have been the November 2012
21 election.

22 Q You participated in creating the document that is
23 exhibit 55?

24 A I did.

25 Q Plaintiffs' exhibit 55?

Davis - direct

1009

1 A I did.

2 Q Did you work with anyone inside the agency to
3 identify appropriate mailing recipients?

4 A Yes. Commissioner Cortez and I developed the formula
5 for the filtered count.

6 Q Did you provide the resulting data that is reflected
7 in Plaintiffs' 55 to anyone outside the agency?

8 A Yes. This report and regular reports just like this
9 were posted on our agency public web site so anybody in
10 the world could have seen the reports.

11 Q Did you provide that data to any special interest
12 groups?

13 A We did. That particular list of addresses that we
14 mailed to was provided directly through the Freedom of
15 Information Act request to the Democratic Party of
16 Virginia, the Virginia New Majority, third party voter
17 registration group. To the Advancement Project, another
18 third party voter registration group. And the League of
19 Women Voters in Virginia.

20 Q Do you know why you provided it to those
21 organizations?

22 A They were also interested, from my understanding, of
23 doing their own out reach to the same voters.

24 Q Did any of the special interest groups you just
25 identified, Mr. Davis, request additional data regarding

Davis - direct

1010

1 active voters likely to vote in the 2014 election?

2 A We have a system in the commonwealth that allows any
3 of those political party candidates and third party voters
4 registration type groups to obtain data from us on a
5 regular basis. So I know for the Democratic Party of
6 Virginia receives data monthly from us on registered voter
7 and absentee voting information. Any other groups could
8 have. I'm not specifically familiar with their requests,
9 though.

10 Q Did you have any way to evaluate or judge how you --
11 strike that. Did you have any way to judge the efficacy
12 of the mailing?

13 A Not the mailing specifically. However, the shear
14 lack of no ID provisional ballots cast in the
15 November 2014 election in my opinion indicates that the
16 out reach efforts were effective.

17 MR. KAUL: Object to that as statement of opinion.
18 That he is not qualified.

19 THE COURT: I think we have to sustain the objection.
20 I think he can testify to how many he received, but I
21 don't know that he can gloss that with his opinion.

22 BY MR. FINBERG:

23 Q All right.

24 We will talk about the professional ballots later. I
25 will move along.

Davis - direct

1011

1 And I think you answered this before, but was there
2 social media-based out reach effort as well?

3 A Yes. We used our Twitter and Facebook accounts to
4 help spread the record about the photo ID requirements.

5 Q Do you know whether there were any radio ads that
6 were done?

7 A There were. Not familiar with all of the content of
8 them, but there were radio ads done.

9 Q Did you have any other duties or tasks in connection
10 with the implementation of SB 1256?

11 A Yes. My team actually built the software that is
12 used by the 133 general registrar offices around the state
13 to capture the photo and signature of individuals applying
14 for the free photo ID. And then we print those IDs in our
15 office?

16 Q Okay. Why did the State Board of Elections develop
17 the free voter ID software internally?

18 A The initial plan had been to seek a vendor to build a
19 system and support a system for us; however, through the
20 procurement process there wasn't a viable vendor solution
21 presented with the funding that was available. So, the
22 agency administration turned to my team to see if we could
23 do something, and we are able to build a system in just a
24 couple of months using --

25 THE COURT: Would you explain how the system worked?

Davis - direct

1012

1 What the objective was of this system?

2 THE WITNESS: Sure. It is a very simple system. A
3 member in the registrar's office can sign into the system.
4 They can look up a voter. If a voter is not in the system
5 already because maybe they are a new applicant, they can
6 enter in the individual's name and information. They then
7 use a web camera to capture the individual's photo. A
8 signature pad to capture the individual's signature. And
9 then submit that data packet to our office where we then
10 process and make the photo ID.

11 THE COURT: This is through a process request by
12 voters for the free identification that the registrar
13 issues; is that correct, Mr. Davis?

14 THE WITNESS: Yes, sir.

15 THE COURT: Go ahead Mr. Finberg.

16 MR. FINBERG: Thank you, Your Honor.

17 BY MR. FINBERG:

18 Q Is there both a software and hardware component?

19 A Yes. We were able to leverage off-the-shelf web
20 cameras and signature pads. And the software runs on
21 Windows Seven or newer computers. So the individual
22 offices provide the actual computer that they hook those
23 devices up to and install our software on.

24 Q And does the software require an internet connection
25 to work?

Davis - direct

1013

1 A It does not. We prefer that it run with the internet
2 connection, but it can run in an offline mode. So the
3 device, the computer can be taken out of the office to
4 events, or maybe a nursing home facility by the local
5 registrar to capture the data needed for photo IDs. It
6 also served as an emergency backup in the event, like last
7 night we had several areas that are now without power or
8 internet access. We can still use the software. Once the
9 internet access is restored, it automatically uploads to
10 our system.

11 Q Did you conduct any in-person training for localities
12 to learn how to use the software and the equipment?

13 A The Department conducted 13 in-person regional
14 training sessions around the state in the summer of 2014.
15 That is where we actually provided the hardware to the
16 localities at those meetings.

17 And we also conducted training at our annual training
18 events that we are required by law to provide, and the
19 localities are required to attend. Both in 2014 and in
20 2015. And additionally in the 2014 electoral board
21 association annual meeting we were invited to present a
22 training session on photo ID.

23 Q Okay.

24 Is the Department of Elections planning to conduct
25 additional training in 2016?

Davis - direct

1014

1 A Yes. So we have our annual training event. It is
2 not scheduled yet, but it will be this summer. We have to
3 do procurement for that.

4 Q Did you conduct any kind of online training in
5 connection with the free voter ID software and hardware?

6 A There were seminars conducted, and there are online
7 training modules. There were online training modules as
8 well that were provided by the agency.

9 Q And who has access to those online training modules?

10 A They would have been made available to the registrars
11 and their offices. In some cases, officers of election.

12 Q Mr. Davis, do you know whether the State Board of
13 Elections keeps track of the free voter ID it issues?

14 A Yes, sir. All of that data comes into our systems,
15 and we track that with the individual voters when we issue
16 IDs.

17 Q In your position as State Board of Elections chief
18 information officer, do you have access to those records?

19 A I do.

20 Q Are you aware that there was a witness earlier this
21 week by the last name of Polatty that testified?

22 A Yes, sir.

23 Q And subsequent to his testimony, did you have the
24 opportunity to look up whether Mr. Polatty ever applied
25 for a free voter ID?

Davis - direct

1015

1 A I did.

2 Q What did you find out?

3 A Mr. Polatty applied for a free photo ID in 2014 and
4 2015. At the time of the election he was issued temporary
5 ID both times. And a permanent ID both times. And our
6 system, also, you know, IDs is -- we mailed the photo IDs
7 to the voter registration address. If that ID comes back
8 undeliverable, there is a place in our system the
9 registrar is to record that. And neither one of the
10 permanent IDs are recorded as being undeliverable.

11 Q Because they are not recorded as being undeliverable,
12 what does that lead you to conclude?

13 A Our assumption at that point is that the Postal
14 Service delivered it to the address we mailed it to.

15 Q I think now we are going to turn to the topic that I
16 promised we would get to, this is, provisional ballots.
17 In your role as State Board of Elections chief information
18 officer, do you have access to the number of provisional
19 no ID ballots cast in 2014?

20 A Yes.

21 THE COURT: You say 2014?

22 MR. FINBERG: 2014, Your Honor.

23 BY MR. FINBERG:

24 Q How do you have access to that information?

25 A So we have a report or data entry point in our system

Davis - direct

1016

1 on election night that we ask the 133 registrars to
2 complete, which is a count of locality wide how many no ID
3 provisional ballots were cast, and how many regular
4 provisional ballots were cast.

5 Q Do you know how many localities in 2014 did not
6 report provisional no ID ballots cast?

7 A Four localities did not complete their report.

8 Q That is four out of 133?

9 A Correct.

10 Q Based on the 129 localities that did report, do you
11 have an estimate of the number of provisional no ID
12 ballots that were cast in 2014?

13 A According to what the localities told us, it was just
14 over 400.

15 THE COURT: That encompasses the entire 129 precincts
16 or localities that reported?

17 A Yes, sir.

18 THE COURT: Okay.

19 These ballots were cast because no ID was produced at
20 the polling place?

21 THE WITNESS: Correct.

22 THE COURT: Okay.

23 BY MR. FINBERG:

24 Q And that number of provisional no ID ballots, do you
25 know -- do you know what the total number of provisional

Davis - direct

1017

1 ballots was? Cast for whatever reason.

2 A In 2014?

3 Q In 2014.

4 If you don't know, is fine.

5 A I don't recall.

6 Q I don't want you to guess.

7 A Sorry.

8 Q If I could ask you to look at plaintiffs' exhibit

9 162.

10 Mr. Davis, are you familiar with this document?

11 A Yes, sir.

12 Q What is this document?

13 A This is the report that I was referring to in the
14 previous question. It would appear that the 400 I gave
15 was incorrect. It appears to be 773. My memory fails me.
16 I apologize.

17 Q So --

18 THE COURT: 773?

19 THE WITNESS: Correct.

20 THE COURT: Okay.

21 BY MR. FINBERG:

22 Q Just so the record is clear, though, after reviewing
23 plaintiffs' exhibit 162, what do you believe the correct
24 number of provisional no ID ballots cast in the 2014
25 election?

Davis - direct

1018

1 A 773 based on what was reported to us that night.

2 And then the answer to the other question, if I may,
3 about how many total were cast? It was a total number of
4 provisional ballots in 2014 as reported to us was 3,622.

5 Q In your role as State Board of Elections chief
6 information officer do you have access to the number of
7 provisional no ID ballots that were cast in the 2015
8 election?

9 A Yes, sir.

10 Q Do you know what the response rate was from the
11 different localities in terms of reporting that
12 information to the State Board?

13 A We had 27 localities that did not report out of the
14 133.

15 THE COURT: How much?

16 THE WITNESS: Twenty-seven.

17 BY MR. FINBERG:

18 Q Based on the 106 localities that did report, do you
19 have an estimate of the number of provisional no ID
20 ballots that were cast in 2015?

21 A I believe that number was the 400 number that was in
22 my head.

23 Q Let's take a look, then, at defendants' exhibit 225.

24 THE COURT: 225.

25 MR. FINBERG: 225, Your Honor.

Davis - direct

1019

1 BY MR. FINBERG:

2 Q Do you recognize this document, Mr. Davis?

3 A Yes, sir. It is the same report that we just looked
4 at, only for the 2015 election instead of 2014 election.

5 Q This was a report that was generated by the
6 Department of Elections in the regular course of business?

7 A Yes, sir.

8 Q Something that you were involved in producing.

9 A Yes, sir.

10 Q I move its admission, Your Honor.

11 THE COURT: 225?

12 MR. FINBERG: 225.

13 THE COURT: Any objection?

14 MR. KAUL: No, Your Honor.

15 THE COURT: It will be received.

16 (Defendants' Exhibit 225 was
17 offered and received in evidence)

18 BY MR. FINBERG:

19 Q So we can verify that the numbers that you just
20 testified about are accurate, looking at this report, what
21 is the number of provisional no ID ballots that were cast
22 in 2015?

23 A 408.

24 Q And do you know the number of total provisional
25 ballots that were cast in 2015?

Davis - direct

1020

1 A Based on what was reported to us in this report 1763.

2 Q Mr. Davis, during the course of this litigation have
3 you been involved in the State Board of Elections document
4 production?

5 A Yes, sir.

6 Q Probably more than you wanted to be.

7 A Yes, sir.

8 Q Did you identify voter histories for individuals who
9 were going to testify in this case?

10 A Yes, I did.

11 MR. FINBERG: Your Honor, I spoke to your courtroom
12 clerk about this earlier. The voter histories have been
13 designated as attorneys' eyes only under the protective
14 order in this case. They were previously the subject of
15 order sealing one of the previous filings based on that
16 ground.

17 I am going to run through some of the voter histories
18 with Mr. Davis. I would ask that they not be displayed on
19 the public two large monitors. They are in the notebooks
20 that are in front of witness and Your Honor.

21 THE COURT: All right.

22 MR. FINBERG: And what I would propose is, we did not
23 lodge them with the clerk's office.

24 THE COURT: I understand. Protected by statute. I
25 did a carve out in my discovery order to protect that.

Davis - direct

1021

1 MR. FINBERG: We will lodge them separately with the
2 Clerk after they are admitted --

3 THE COURT: All right.

4 MR. FINBERG: -- in its own separate binder.

5 THE COURT: All right. That is fine.

6 MR. KAUL: We don't object to that.

7 THE COURT: You don't object. Okay.

8 BY MR. FINBERG:

9 Q So, Mr. Davis, let me ask you to take a look at
10 defendants' exhibit 240.

11 THE COURT: Defendants' 240.

12 MR. FINBERG: 240, Your Honor.

13 BY MR. FINBERG:

14 Q Can you put it up there?

15 Mr. Davis, what is defendants' exhibit 240?

16 A This is a report from the voter registration system
17 for the commonwealth that provides an overview of voter
18 records, an individual's voter record.

19 Q Okay. So that the Court understands, what is
20 contained in these documents? Let me ask you to run
21 through some of the different fields that are contained in
22 the voter history.

23 What information is provided in the -- first of all,
24 what is the name of the voter in this?

25 A Mary Joanna Jones.

Davis - direct

1022

1 Q What information is provided in the overview section?

2 A Here we have the voter ID number, which is our
3 identification number for each individual voter. Their
4 gender. The year of their birth. We do have their full
5 date of birth in our system, but for security purposes
6 only. We don't publish that when we can help it.

7 Their registration status, and in the case of this
8 voter her status is active. The registration address.
9 The locality of registration, which in the case here would
10 be Albemarle County. The voter's precinct, which is
11 precinct 601 Crozet. The last date they voted. In this
12 voter's case would have been November 2015. And last
13 activity date, which in this case was the last time of the
14 voter voted. If we have an electronic signature on file,
15 it would appear as well. And there is also a long
16 preference.

17 Q Mr. Davis, what is the difference between last vote
18 date and last activity date?

19 A So, let's suppose that Ms. Jones submitted a voter
20 registration form in January of 2016. Her last activity
21 date would reflect that date, whereas her last vote date
22 was the last time that she voted.

23 Q Let's move down this document to the registration
24 history section.

25 If you could just describe to the Court what is

Davis - direct

1023

1 reflected in the registration history section?

2 A So, this shows essentially the information that would
3 have been on our registration form received by the
4 locality, or the department for this voter. So this voter
5 had a record that was in existence from February 1981
6 through October 2015. And she updated her registration
7 through a form. It doesn't appear her address or anything
8 like that changed, but we get duplicate registrations of
9 that fairly frequently in our world.

10 Q Let's move down and talk about the voting history
11 section.

12 A Shows the voter's history in elections. So you can
13 see this voter voted in each of the November general
14 elections going back to 2005. Actually continues on to
15 the second page, all the way back to 2003. It appears
16 maybe she missed the 2009 and '11 elections in there. But
17 you can see what we looking at it. You can also see if
18 she voted absentee. And in those elections whether she
19 cast a provisional ballot in those elections. If it was a
20 provisional, whether it was counted or not.

21 Q Along those lines, let me direct your attention to
22 the entry in Ms. Jones' voter history for the 2014
23 November general election. Do you see that?

24 A I do.

25 Q What does this document tell you about Ms. Jones'

Davis - direct

1024

1 experience voting in that election?

2 A Ms. Jones cast a provisional ballot and it was
3 counted.

4 MR. FINBERG: Your Honor, I am going to get the
5 witness to identify the following exhibits as being the
6 exhibits for witnesses who have testified during the case.
7 Not intending to go through them one by one with him.

8 THE COURT: I appreciate that very much.

9 They will be in evidence, and I can review them as
10 necessary.

11 MR. FINBERG: That is the intention, Your Honor.

12 THE COURT: Fine. Proceed.

13 BY MR. FINBERG:

14 Q Can you please take a look at Defendants' trial
15 exhibit 241.

16 A Yes, sir.

17 Q Whose voting history is exhibit 241?

18 A Ellen Lamb.

19 Q Thank you.

20 If you can go to trial exhibit 243, please.

21 A Okay.

22 Q Whose voting history is contained in exhibit 243?

23 A I apologize to the voter for the pronunciation of the
24 name.

25 Q Could you spell it instead of pronouncing it, then?

Davis - direct

1025

1 A Sure can. Josephine Okiakpe. Last name is spelled
2 O-K-I-A-K-P-E.
3 Q Thank you, Mr. Davis.
4 Look at exhibit 247, defendants' exhibit 247.
5 A Okay.
6 Q Whose voting history is that?
7 A Laning Polatty.
8 Q Defendants' exhibit 248, please.
9 A Okay. This is Sharon -- Shanna Samson.
10 Q Defendants' exhibit 249, Mr. Davis.
11 A Bobbie Lee Smith.
12 Q Defendants' exhibit 250?
13 A Karen Stallings.
14 Q Defendants' exhibit 251?
15 A Jennifer C. Litton Tidd.
16 Q Defendants' exhibit 255?
17 A Clayton Stallings.
18 Q Defendants' Exhibit 270?
19 THE COURT: What was the last number? I'm sorry.
20 MR. FINBERG: Quite all right, Your Honor.
21 251 was the last.
22 THE COURT: I got that one.
23 MR. FINBERG: Then 255.
24 THE COURT: Thank you. Go right ahead. Didn't mean
25 to interrupt you.

Davis - direct

1026

1 THE WITNESS: 270 is that where we are at?

2 BY MR. FINBERG:

3 Q 270, yes.

4 A Barbara Hawkins Lee.

5 Q 231. Defendants' 231.

6 A I am missing. It must be out of order. 231.

7 Charles Steven Benagh B-E-N-A-G-H.

8 Q Defendants' exhibit 234?

9 A Megan Lynn Cotten.

10 Q Defendants' exhibit 237?

11 A Jack Nixon Etheredge.

12 Q And defendants' exhibit 238?

13 A Pettus Hilt, H-I-L-T.

14 MR. FINBERG: Your Honor, if memory serves me, I
15 think we have forgotten to include one for Abe Barranca,
16 which I would ask permission to proffer at a later time.

17 THE COURT: You may submit that.

18 MR. KAUL: We have no objection.

19 THE COURT: Any objection to these exhibits?

20 MR. KAUL: No, Your Honor.

21 THE COURT: They will be received without objection.

22 (Defendants' exhibits 231, 234, 237, 238,

23 241, 243, 247, 248, 249, 250, 251, 255, 270,

24 were offered and received in evidence)

25 MR. FINBERG: Thank you.

Davis - cross

1027

1 No further questions for Mr. Davis.

2 THE COURT: Cross examination of Mr. Davis?

3 MR. FINBERG: Thank you.

4 THE COURT: Yes, sir.

5 CROSS EXAMINATION

6 BY MR. KAUL:

7 Q Mr. Davis, how you doing today?

8 A Doing okay. Thank you.

9 Q My name is Josh Kaul, one of the attorneys for the
10 plaintiff in this case. Let me start out by asking you
11 about the voter history we just reviewed.

12 A Okay.

13 Q Who submits the information that is used to generate
14 those files?

15 A The local registrars.

16 Q So that is not something that your office -- not
17 based on data that your office generates, you just collect
18 it?

19 A Correct.

20 Q Would it be fair to say local registrars sometimes
21 make mistakes on data they send you?

22 A Yes.

23 Q Sometimes they don't even send you the data they are
24 supposed to, it looks like, right?

25 A Correct.

1 Q Speaking of which, in 2014 the provisional count, you
2 said four localities didn't provide data?

3 A Correct.

4 Q And this was plaintiffs' 162, if you want to look at
5 it.

6 Looking at the exhibit I see asterisks next to
7 Rockingham County, but it doesn't spell out which
8 localities didn't provide data. Do you know which four
9 they were?

10 A Yes. Looking at the report where it says "not
11 reported," which is also with the asterisk, means that
12 would indicate the localities that did not report. So in
13 this case Amhurst.

14 Q Which one are you looking at?

15 A The 2014 report, exhibit 162.

16 Q Is this plaintiffs' or defendants'?

17 A Plaintiffs', sorry.

18 THE COURT: What exhibit number are you referring to
19 at this point?

20 MR. KAUL: Sorry. 162. I just learned my exhibit is
21 two-sided.

22 THE COURT: Plaintiffs' 162. Okay.

23 BY MR. KAUL:

24 Q Actually four counties.

25 A Correct. We use the term "localities" because cities

1 and counties are independent units.

2 Q And you don't know how that affected the total,
3 right?

4 A Not from this report, no.

5 Q Do you know any other way?

6 A We don't have a statewide record that provides a
7 count beyond that. So I don't have that number.

8 Q All right.

9 In 2015, this is plaintiffs' -- I don't know if 162
10 was moved or not, but if it wasn't, I would move it in.

11 MR. FINBERG: I was under the assumption --

12 THE COURT: It was not moved in.

13 MR. FINBERG: I used it. Any objection I might have
14 had was probably waived at that point.

15 THE COURT: I will receive it without objection.

16 Go ahead right. You are right, it was not in
17 evidence.

18 (Plaintiffs' Exhibit 161 was
19 offered and received in evidence)

20 BY MR. KAUL:

21 Q Plaintiffs' 161 was data for 2015, right?

22 A I don't know that I have Plaintiffs' 161 in front of
23 me.

24 Q Sorry. Defendants' 225?

25 A 225, Defendants' exhibit, is the 2015 report.

1 Q At that time you said that the 27 localities didn't
2 report.

3 A Correct.

4 Q So clearly the numbers here are going to be an under
5 count of the total numbers for 2015, right?

6 A Correct.

7 Q So, first of all, everybody who is listed as a no ID
8 provisional is somebody who had to cure their ballot
9 somehow in order to have that ballot counted, right?

10 A Correct.

11 Q All right.

12 In both of these elections about half of the people
13 who cast provisional ballots cured them, and about the
14 other half their votes weren't counted; is that right?

15 A I do not know the statistics on that. Sorry.

16 Q You have the total number of no ID provisionals?

17 A Correct.

18 Q Do you have any data on the number of people who
19 showed up to vote who learned they didn't have the
20 appropriate ID and then left the polling place?

21 A No.

22 Q Do you have any data on the number of people who just
23 didn't show up to vote because of the ID requirement?

24 A No.

25 Q The data regarding provisional ballots, is that data

1 that the localities are required to provide to you?

2 A It is complicated question. They are required to

3 enter the details of provisional ballots that are counted

4 into our system. If it is a registered voter and for some

5 reason it is not counted they are supposed to enter it as

6 well. If it's somebody who is not yet registered at the

7 area it is a little more gray whether they are required to

8 enter it or not.

9 Q But you are at least supposed to get the provisional

10 ballot counts for each locality, right?

11 A Yes. The data entry that generates the two reports

12 we have been looking at here is not required of them to

13 enter it. It is requested. They do, because we get

14 questions on election night from media and the parties

15 about how many provisional ballots were cast.

16 Q Okay. So in 2015, 27 counties ignored that request?

17 A Yes.

18 Q Did that raise any concerns within the agency?

19 A Certainly.

20 Q Did you take any steps to address that?

21 A We asked nicely to fill it out.

22 Q Would it be fair to say you are limited in the degree

23 to which you can exercise control over the localities by

24 resource constraints and a variety of other factors?

25 A And legal constraints and things, yes, sir.

Davis - cross

1032

1 Q Are there other areas the counties don't follow your
2 requests?

3 A So our agency's mission is to provide uniformity, so
4 we provide procedures and guidance and training for that.
5 We don't have an enforcement arm or power in most cases to
6 enforce compliance. Except for in very certain areas that
7 I am not all that familiar with. But it is an on-going
8 problem for the agency.

9 Q Okay. You talked a little bit about out reach. You
10 are not in the out reach department, right?

11 A No, sir.

12 Q And you talked about having done a filtered mailing,
13 is that right?

14 A Yes, sir.

15 Q And what that means is that you didn't send your
16 mailing to all active voters, you picked a subset to send
17 it to?

18 A Correct.

19 Q What percentage of registered voters did you send
20 that to approximately?

21 A There were approximately five point two million
22 registered voters, and we mailed to 86,000. My math is
23 not that great. I apologize.

24 Q You didn't just filter from active voters, you also
25 filtered among the population of people who didn't have

1 DMV ID, correct?

2 A Based on, I believe it was 55 -- the total number of
3 active voters without ID was just shy of 200,000, and we
4 mailed to 86,000.

5 Q Why didn't you mail it to all 200,000 or so?

6 A The agency has limited resources, so we were trying
7 to use our resources to the best that we could.

8 Q If you are going to appropriate more money for out
9 reach, you could have mailed to everybody who didn't have
10 a DMV identity?

11 A Certainly.

12 Q Would you like to have done that?

13 A We would like to do a lot of things in our agency
14 with proper funding.

15 Q Were you at the State Board of Elections in 2012 when
16 the 2012 ID law was being implemented?

17 A Yes.

18 Q When the 2012 law was implemented did the agency send
19 out voter registration cards?

20 A Yes, sir. The 2012 law, the implementation time line
21 occurred at the same time that congressional redistricting
22 was completed in the commonwealth. And as result the law
23 requires us to provide voter cards for impacted voters.
24 And at that time a voter card combined with a brochure was
25 sent to all actively registered voters in the

1 commonwealth.

2 Q To be clear about that. Voter cards were sent to a
3 number of voters in relation to redistricting prior to the
4 2012 mailing, right?

5 A Redistricting during that cycle was quite an
6 interesting time in our office and still is. We get to do
7 it again in a couple weeks. I am so excited. So the
8 General Assembly did their state districts in 2011. And
9 then the congressional districts in 2012. And because of
10 that, and because of some special elections and things
11 that ended up being done in like three or four different
12 phases I forgot the exact breakout. We did lots of
13 batches of voter cards over the course of that time
14 period.

15 Q You say you send those voter cards in connection with
16 redistricting to any voter whose district from one of the
17 different offices had changed because of redistricting?

18 A Correct.

19 Q It wouldn't be state-wide, it would just be the
20 subset of people impacted?

21 A It ended up -- sorry. Trying to remember the full
22 details on that.

23 Most voters received two voter cards over that two
24 year time period, but we did that final mailing at that
25 time just because there had been so much fog and confusion

1 to get that information out there to make sure folks know
2 where they were supposed to vote. It also provides the
3 poll location.

4 Q So in connection with the 2012 voter ID law, though,
5 the Governor insured that money was available to send
6 voter registration cards, which at the time would be used
7 to vote to every registered voter in Virginia, right?

8 A I don't know who insured the funding was there or
9 not, but I believe the Federal Help America Vote Act was
10 used for that mailing.

11 Q In 2012 everybody got a permissible form of ID.

12 A Active voters, yes, sir.

13 Q And in the 2013 law you contacted only 88,000.

14 A Approximately, yes, sir.

15 Q Because of limited in funds, right?

16 A Yes, sir.

17 Q Let me ask you about mobile ID units.

18 A Okay.

19 Q What does a locality need to have a mobile free voter
20 ID unit. Before I ask that, could you explain what that
21 is?

22 A Sure. They need a computer, a Windows seven or
23 better computer they can take with them that has a place
24 to plug in a web camera and a signature capturing device
25 that has our software installed. It could be a lap top,

1 could be a Windows tablet, or desk top if they wanted to
2 hoof it around with them.

3 Q But you need a camera with the software, you said?

4 A Correct.

5 Q And so every jurisdiction, every locality has a set
6 up at their general registrar's office, right?

7 A Correct.

8 Q And so if a locality wants to do mobile units, they
9 would need to get an additional camera, correct?

10 A Correct. We provided all the localities with a quote
11 from a state vendor for purchasing additional cameras and
12 signature pads if they wanted to do so.

13 Q And it is my understanding that Fairfax is the only
14 county you know that has an extra camera?

15 A To my knowledge, the only one I am aware of.

16 Q So that means that Fairfax is the only county you are
17 aware of that has a mobile unit for free IDs?

18 A That I am aware of, yes.

19 There was no requirement to tell us that they had a
20 mobile unit, so I just know because Fairfax bought the
21 wrong equipment when they started. So I got involved to
22 fix that.

23 Q As a member of the agency you weighed in with your
24 colleagues about whether expired forms of identification
25 should be accepted for voting; is that right?

1 A I was not involved in the policy decisions in regards
2 to that. But I was involved in the decision to not put an
3 expiration date on the IDs that we print.

4 Q The same thing Ms. Cherry was just informing me of.

5 A Okay.

6 Q So, what position did you take in that, in that
7 discussion?

8 A For logistics and cost reasons we, and for lack of
9 specific direction in the law, we did not put an
10 expiration date on the photo IDs that we printed.

11 Q Also because there was no reason to have an
12 expiration date for an identification form, correct?

13 A The law did not tell us it needed to have one. So we
14 were trying, we try to implement minimally when it comes
15 to things like that.

16 Q You discussed one of the matching analyzes that the
17 agency conducted, which I guess would be the most recent
18 one; is that right?

19 By matching analyzes, I mean analyzes that you use
20 comparing the DMV data to voter registration to determine
21 how many voters didn't have a DMV identification. The one
22 that you have talked about on direct, the most recent
23 version of that analyzes.

24 A We receive a new file every month from the Department
25 of Motor Vehicles, and have our automated process that

1 matches voters to that data every month. But in terms
2 actually doing analyzes of it, I have not looked at it
3 personally in quite some time.

4 Q Okay.

5 Now, you generated at least one of those matching
6 analyzes before the voter ID law was passed; is that
7 right?

8 A Yes, sir.

9 Q Do you know why that was generated?

10 A It would have been at the request of the agency
11 leadership at the time. Probably during the legislative
12 cycle.

13 Q Let me have Plaintiffs' exhibit 97 brought up to the
14 screen.

15 I am going to ask you to take a look at that. If we
16 could scroll through the three pages.

17 Did we pass page two? I think. All right.

18 So, go back to page three. Do you recognize this
19 document?

20 A It looks like something that I produced. I don't see
21 a date on it, so I don't know like when it was run, but it
22 is a format of something that I would produced.

23 Q To the best of your understanding you produced this?

24 A Correct.

25 Q And this is one of those matching tables, correct?

1 A Yes.

2 Q In the far -- well, there are titles to each column,
3 correct?

4 A Yes.

5 Q Each column?

6 I want to be clear. Inactive voters, are they
7 eligible to vote?

8 A Yes, sir.

9 If they sign their affirmation of identity when they
10 show up.

11 Q What do you mean by that?

12 A I believe there is a form they have to sign if they
13 show up to vote and they are flagged as inactive in our
14 system.

15 Q What are they signing? What are they attesting to?

16 A They are still a resident I believe at that
17 registration address.

18 Q There are not identification required for that?

19 A Nothing additional that -- outside the other
20 identification requirements that I am aware of.

21 Q You were describing before what filtered and active
22 and inactive meant, right?

23 A Yes, sir.

24 Q And the filtered inactive voters, did they receive,
25 those people who did receive your contacts?

1 A The inactive voters did not receive a mailing from us
2 in 2014 or in 2012.

3 Q This indicates that as of the time that this was
4 generated, which you are not sure of, there were just
5 under 200,000 active voters who had no DMV ID in Virginia?

6 A Correct.

7 Q Another 120,000 inactive voters with no DMV ID?

8 A Correct.

9 Q All of those 120,000 are eligible Virginia voters
10 right? Let me rephrase that.

11 All registered to vote in Virginia, and can vote with
12 that registration so long as they fill out the affirmation
13 you described?

14 A That is my understanding, yes, sir.

15 Q Then I will ask to bring up Plaintiffs' 156.

16 While she is doing that, Your Honor, I move
17 Plaintiffs' exhibit 97, which is the one I was just
18 showing.

19 MR. FINBERG: Already in without objection.

20 THE COURT: Okay.

21 BY MR. KAUL:

22 Q I believe this will provide clarity as to the date.

23 A Yes, sir.

24 Q This is --

25 THE COURT: What was the number of this exhibit?

1 Sorry.

2 MR. KAUL: This is 156.

3 THE COURT: 156. All right.

4 This is already in evidence, is that correct?

5 MR. FINBERG: This one is not, but we have no
6 objection.

7 THE COURT: All right. Plaintiffs' 156 will be
8 received.

9 (Plaintiffs' Exhibit 156 was
10 offered and received in evidence)

11 BY MR. KAUL:

12 Q Thank you, Your Honor.

13 This is the same basic data, but you have slightly
14 different categories of data here; is that right?

15 A Yes.

16 Q And so this indicates data generated as of September
17 of 2014?

18 A Correct.

19 Q This one has columns that refer to out reach target
20 and out reach target percentage. Do you see that?

21 A I do.

22 Q What does that mean?

23 A I do not know. Is there a second page maybe where
24 the asterisk has a definition?

25 Q That is a very good idea. There we go.

Davis - cross

1042

1 A This is the same definition I provided earlier in my
2 testimony of the filtered counts.

3 Q So the out reach target reflects the filtered count?

4 A That is what it appears, yes, sir.

5 Q All right.

6 The target percentage would be the percentage of
7 active voters who are in the filtered count in the
8 locality, is that right?

9 A That would be my assumption without a calculator.

10 Q I won't hold you to the math.

11 A Thank you.

12 Q You have also statistics regarding the number of free
13 IDs issued; is that right?

14 A Yes, sir.

15 Q I am going to run through those documents to confirm
16 they are what they appear. If counsel has no objection, I
17 will do it that way. I have got Plaintiffs' exhibit 56.

18 THE COURT: Fifty-six.

19 MR. KAUL: 153.

20 THE COURT: 153.

21 MR. KAUL: And 163.

22 THE COURT: Any objection, Mr. Finberg?

23 MR. FINBERG: No, Your Honor.

24 THE COURT: It will be received.

25 (Plaintiffs' Exhibit 153 and 163

were offered and received in evidence)

THE COURT: These are what?

MR. KAUL: Are charts that you have prepared showing the number of voters who have obtained the no fee or free voter ID, correct?

THE WITNESS: Correct.

BY MR. KAUL:

Q I'm not sure if you have had a chance to look, but do those appear to be charts of that to you?

A Yes, sir.

Q And they are data broken down by locality, among other things.

A Yes, sir.

MR. KAUL: May I confer with Mr. Finberg just a moment, Your Honor?

THE COURT: Yes, sir.

BY MR. KAUL:

Q Briefly I want to ask you, have you could you call up Plaintiffs' exhibit 66.

I am going to ask Ms. Schultz to briefly scroll through this and ask if you recognize it. So do you recognize that?

A I have seen this report before, yes, sir.

Q What is this?

25 A From -- my understanding is that it is a report that

1 was produced out of a survey that was by our agency asking
2 for this information from the different localities.

3 Q This is a survey in which you collected the number of
4 voters who used an affirmation of identity to establish
5 their identity before the 2012 voter ID law was passed, is
6 that right?

7 A It covers '08 and '12 elections.

8 THE COURT: 2008 to 2011?

9 THE WITNESS: '12. Through the March primary.

10 THE COURT: Thank you.

11 BY MR. KAUL:

12 Q That is because of the voter ID law in 2012 wasn't in
13 effect until after the primary, right?

14 A I believe so, yes, sir.

15 MR. KAUL: Your Honor, I would move in as plaintiffs'
16 exhibit 66.

17 THE COURT: Any objection?

18 MR. FINBERG: Your Honor, my objection is this. I
19 don't believe that he established a proper foundation that
20 this is a document that came from the State Board or this
21 witness had any part in generating.

22 THE COURT: You may want to firm that up. He was
23 very equivocal. So why not explore that a bit?

24 BY MR. KAUL:

25 Q I appreciate that.

1 Is this a document that you reviewed in the course of
2 your work with either the State Board or Department of
3 Elections?

4 Let me ask a different way. You said you have seen
5 this before, right?

6 A Yes, sir.

7 Q Where did you see it?

8 A In the process of providing information for this
9 case.

10 Q So you produced this document in discovery.

11 A I was involved in the collection of all that, so it
12 was part of the stuff that I would have turned over.

13 Q And the documents you were producing were documents
14 that were Department of Elections or State Board of
15 Elections documents; is that right?

16 A Correct.

17 MR. FINBERG: The issue, I guess, Your Honor, is that
18 everything that was produced by the Department, by the
19 defendants in this case has a bates number on it.

20 THE COURT: A what?

21 MR. FINBERG: A bates number on it with the VSB
22 prefix, and this document does not have the VSB prefix. I
23 am not sure where it came from.

24 THE COURT: You may not be able to get it in, but you
25 can refresh his recollection, if you can, and have him

1 testify to it.

2 MR. KAUL: Just to respond. My understanding is that
3 the documents produced in native format, like EXCEL
4 sheets, does not have a bates number, which is why this
5 one does not.

6 MR. FINBERG: On the exhibit list it is noted that it
7 has a TLF prefix.

8 MR. KAUL: Oh. I see.

9 Did you produce documents in response to a FOIA
10 request in this case?

11 THE WITNESS: Yes.

12 MR. FINBERG: FOIA is separate from the case.

13 MR. KAUL: I apologize.

14 BY MR. KAUL:

15 Q I was confused. This is one of the documents you
16 produced in response to FOIA?

17 A I don't remember the specifics of that, but I am the
18 person who provides all of that stuff for a FOIA request
19 in our agency.

20 Q Let me ask this way.

21 A Certainly.

22 Q Are you certain you provided this document in
23 response to either to a FOIA request or a production
24 request in this case?

25 A I am reasonably certain it was something that I

1 provided in the course of my job. I don't remember the
2 specifics of which response it would have been part of.

3 MR. KAUL: Your Honor, I believe that is certainly a
4 preponderance of the evidence that this is a document in
5 their possession.

6 THE COURT: To say it is in is to be generous, but I
7 will let it in. Actually, in the interest of the
8 shortness of life. Okay. All right. I will let it in.

9 (Plaintiffs' Exhibit 66 was
10 offered and received in evidence)

11 BY MR. KAUL:

12 Q All right.

13 I think we already talked about what is in the
14 document. I will leave it at that.

15 The DMV matching analysis that you have conducted,
16 how, if at all, are expired DMV licenses accounted for in
17 that analysis?

18 A We only receive -- the monthly file we receive is
19 just the people who currently have a license with DMV.

20 Q If somebody has an expired license are they listed as
21 having one?

22 A No. I don't have expiration dates or anything like
23 that from DMV. I just get a list of, here everybody who
24 has a DMV license today.

25 Q Do you know if they include expired licenses on that

1 list?

2 A Not included as far as I am aware.

3 Q But the DMV, I guess, would know best.

4 A Yes.

5 Q Do you know if suspended licenses are included on
6 that list?

7 A I don't believe that they are. But I don't have --
8 there is not a flag to indicate whether a license is
9 suspended or not.

10 Q You are not certain?

11 A Not a hundred percent, no, sir.

12 Q What about lost licenses. Presumably would be
13 included on the list unless that were reported, right?

14 A Yes.

15 Q And what about revoked licenses? Again, fair to say
16 you don't know for sure?

17 A My understanding is revoked is not included. That
18 would be a Department of Motor Vehicles that would remove
19 that license as being a license.

20 Q DMV would be the best source?

21 A Correct.

22 Q No further questions.

23 THE COURT: Redirect?

24 MR. FINBERG: Very brief.

25 THE COURT: All right.

1 REDIRECT EXAMINATION

2 BY MR. FINBERG:

3 Q Mr. Davis, you were asked some questions about that
4 spread sheet that was Plaintiffs' exhibit 66. Do you
5 recall? It's the one produced in response to the FOIA
6 request.

7 A Yes, sir.

8 Q Do you know the source of the data in that document?

9 THE COURT: Excuse me. What document are you
10 referring to? I didn't catch it.

11 MR. FINBERG: Plaintiffs' 66.

12 THE COURT: 66. Go ahead. Sorry.

13 THE WITNESS: It would have been the result of a
14 survey, online survey process that our agency requested
15 the localities respond to.

16 BY MR. FINBERG:

17 Q Mr. Kaul asked you some questions about mobile units
18 and web cams and signature pads. Do you recall that?

19 A Yes, sir.

20 Q What is the cost for a web cam?

21 A The two devices that we purchased, one was about \$75
22 and the other one was about \$140. I don't remember which
23 was the web cam and which was the signature pad.

24 Q Would any web cam that somebody could pick up at Best
25 Buy work for this purpose?

Davis - redirect

1050

1 A Potentially it could. We specifically went with a
2 specific model so we could support it with our resources.

3 Q Okay. But the cost of the two pieces of equipment
4 combined would be how much?

5 A Approximately \$220. Again, my math may not be
6 correct.

7 Q Better than mine, I guarantee you that.

8 Mr. Kaul asked you some questions about the
9 approximately 88,000 people that received the mailing.

10 A Okay.

11 Q Just so we are clear, how did the Department go about
12 making a determination of who those 88,000 people should
13 be?

14 A We looked at what information we had available to us
15 so that we could best use the resources available. If a
16 voter self-indicated being a member of military, the
17 assumption was made they had a Department of Defense
18 issued identification card. If they had taken action to
19 be on absentee, absentee voter, they will be voting by
20 mail, would not have to show a form of photo
21 identification. So they were excluded. And then we
22 looked at whether there was someone who was in our opinion
23 more likely to show up to vote in an up-coming election.
24 So we looked at people with some form of voter activities
25 over the last roughly two years at the time.

Davis - redirect

1051

1 Q I don't have any further questions, Your Honor.

2 THE COURT: May Mr. Davis be excused?

3 MR. FINBERG: He may, Your Honor.

4 MR. KAUL: Yes.

5 THE COURT: Thank you for coming in. We appreciate
6 your testimony.

7 (Witness stood aside)

8 Does anybody have a short witness?

9 MR. SPIVA: I think the witness that we have is
10 probably fairly short, but I don't know how long the cross
11 will be.

12 THE COURT: We will go ahead with direct and hope the
13 cross will be short. Okay?

14 Call the next witness.

15 MR. SPIVA: Your Honor the plaintiff calls Rebecca
16 Slutsky, Executive Director of the Democratic Party of
17 Virginia.

18 THE COURT: All right.

19 Come forward. Is she here? Yes, come forward.

20 Raise your right hand, left on the Bible, face the Clerk
21 of the Court.

22 BARBARA SLUTSKY

23 WAS SWORN AND TESTIFIED AS FOLLOWS:

24 THE COURT: She is your witness?

25 MR. SPIVA: Yes, Your Honor. Yes.

Slutzky - direct

1052

1 THE COURT: All right.

2 DIRECT EXAMINATION

3 BY MR. SPIVA:

4 Q Good morning, Ms Slutzky.

5 A We can go with that.

6 Q Okay. Where you do you work?

7 A At the Democratic Party of Virginia.

8 Q How long have you worked there?

9 A I started May 2015.

10 Q What is your role and title there?

11 A I am the executive director.

12 Q Can you briefly describe your political experience
13 before coming to work as the Executive Director of the
14 Democratic Party of Virginia?

15 A Absolutely.

16 After graduating college I worked several campaigns
17 in different states. In terms of Virginia, I was the
18 regional field director in 2008 for the Obama/Warner
19 campaign. And in 2009 I was, worked in the political
20 department of both Terry McAuliffe's first race, and then
21 Senator Deeds' governor race in 2009.

22 Q In those roles did you work at all with the
23 Democratic Party of Virginia?

24 A I did. In 2008 I worked for what is considered the
25 coordinated campaign, which worked basically as the

Slutzky - direct

1053

1 Democratic Party of Virginia. So worked closely on all of
2 the races.

3 Q All right.

4 As part of your job as executive director have you
5 had to become familiar with the Democratic Party of
6 Virginia's plans and strategies in the past to the extent
7 you were not already familiar with them?

8 A Absolutely. We spent a lot of time, obviously,
9 reviewing things we have done each year so we can always
10 improve.

11 Q What is the, I will call it DP/VA if that all right
12 with you, what is DP/VA's mission?

13 A We had two missions. To get Democrats elected and
14 keep them in office.

15 Q Can you describe briefly the organizational structure
16 for the DP/VA?

17 A Absolutely. We have what we consider our local
18 parties, which is every basic locality, the cities and
19 counties, across the state. Each have their own, you
20 know, representation, if you will.

21 We then, from the state-wide level as a steering
22 committee, a central committee, and then we have the
23 staff.

24 Q Can you briefly describe what kinds of activities the
25 DP/VA engages in?

1 A Of course.

2 We do a lot of field training and voter education.
3 We particularly focused on what I would consider both
4 first persuasion and then turn out. We also work with
5 current elected to kind of have their back across the
6 board in anything that they are doing.

7 Q Who do you consider to be a member of the DP/VA?

8 A Anyone who leans Democratic can vote Democratic.

9 Q Is that set forth in one of the DP/VA's governing
10 documents?

11 A It is laid out in the party plan.

12 THE COURT: Anyone who leans Democratic and votes
13 Democratic; is that correct?

14 THE WITNESS: Yes, basically anyone who considers
15 themselves associated with the Democratic Party is a member.

16 THE COURT: Thank you.

17 BY MR. SPIVA:

18 Q Is that definition of membership or constituency set
19 forth in any governing documents of the DP/VA?

20 A I don't have the exact wording, but it is laid out in
21 the party plan.

22 Q What if someone only votes for Democrats some of the
23 time? Do you still consider them a member or a
24 constituent?

25 A We do. Again, it is anyone who we think might vote

Slutzky - direct

1055

1 for us is. You know, we are a party of inclusion, so we
2 want to include them in our efforts and persuade them for
3 our candidates and turn them out.

4 Q Can you describe the types of groups that DP/VA
5 considers to be its most reliable voters?

6 A Absolutely. Certainly minority voters, young people,
7 and to some extent seniors as well.

8 THE COURT: Would you repeat that for me one more
9 time?

10 A And how --

11 THE WITNESS: Absolutely.

12 THE COURT: Slow down just a little bit so this
13 gentleman can take it down.

14 THE WITNESS: I apologize.

15 Minority populations, young people, and to some
16 extent seniors.

17 BY MR. SPIVA:

18 Q How do you come to your understanding of that, who
19 those reliable Democratic voters are?

20 A I would say it is kind of my business to know that.
21 We have done, you know, it is the nature of the business.
22 We know who our -- we know who votes Democrat. We track
23 it, and analyze it. We track it. Kind of common
24 knowledge within the industry.

25 Q Let me turn your attention to the recent voter ID

Slutzky - direct

1056

1 laws. And in particular, the 2013 photo ID law. Do you
2 have some familiarity with that?

3 A I do.

4 Q Does the DP/VA oppose the 2013 photo ID law?

5 A Yes, we do.

6 Q Why is that?

7 A Because it disenfranchises other voters. It makes it
8 harder for Democrats to show up and vote.

9 Q How do you know down that?

10 A Because, again, it is kind of common knowledge within
11 the industry. The specific types of registered voters in
12 the state that are less likely to have an ID tend to be
13 more Democratic.

14 Q Have you received any knowledge from people who work
15 for you within the organization that support that view?

16 A Absolutely. We have a voter protection director on
17 staff. She is extremely focused on making sure from a
18 legal perspective everyone has the opportunity to vote,
19 and she keeps me updated on this sort of thing. She spent
20 a lot of time talking to me about the ID laws.

21 Q Has DP/VA had to undertake any efforts to overcome
22 the effects of the 2013 voter law. First focus on past
23 efforts. I will ask in minute what you are planning to
24 do, or what you are doing now. But in previous elections
25 since it has been enforced has the DP/VA had to undertake

Slutzky - direct

1057

1 any efforts to overcome the effects of the 2013 ID law?

2 A We have had.

3 We have had to dedicate a significant portion of our
4 both organizer training and our volunteer training to
5 basically -- historically, in 2008 for example, our focus
6 was with turn out our voters, and then register and get
7 them to the polls. Now the extra step is we need to
8 register our voters, persuade them to vote for our
9 candidate, and teach them how to vote. So we have had to
10 do a decent amount of training through kind of all our
11 different training mechanisms to educate them.

12 On top of that, our local committees have acquired
13 lists from of likely voters who do not have photo IDs.
14 And they have culled through, and basically educate them
15 on the rules with the voter IDs, and they have in some
16 situations gone out and even transported them, taken them
17 to the registrar's office and had basically walked them
18 through all the steps. Any voters we find that doesn't
19 have ID, we make sure they can vote.

20 Q Have you had to hire anybody in particular as a
21 result of the 2013 photo ID law?

22 A That was certainly a factor in our decision to have a
23 voter protection director year round instead of two
24 months, and now it is now a full time, year round salary.

25 THE COURT: Voter protection director?

1 THE WITNESS: Voter protection director.

2 BY MR. SPIVA:

3 Q What did the director do? What is her
4 responsibility, if you can briefly describe that?

5 A Absolutely. She works with the State Board of
6 Elections. She works with the registrar's office. The
7 electoral board. She is working on building up those
8 relationships. She will kind of prepare photo ID
9 education documents for both local committees. She has
10 done field training when we have been out there educating
11 our activists. She will walk them through the steps to
12 make sure that anyone we have that is recruiting and
13 training and working with voters is as informed as
14 possible.

15 Q And not just limiting this to the voter protection
16 director, but all of the other activities that you have
17 described a minute ago, does that cost money?

18 A Yes, it does.

19 Q Did that cost time in terms of staff resources?

20 A Yes, it does.

21 Q Did it involve the use of volunteer time?

22 A Absolutely.

23 Q If the 2013 photo ID law had not gone into effect,
24 would DP/VA have used those resources for something else?

25 A Absolutely.

1 Q What kind of things would you have done?

2 A We would have used -- we are the Democratic Party.

3 We are going to spend every dollar we can get our hands on
4 persuading and turning out voters. So every dollar we
5 raise, we will have, we spend on those efforts. And by
6 not having to focus a percentage of those -- not saying
7 there wouldn't be any voter education, but I would say
8 significantly more education associated with the these ID
9 laws. And we would have been able to use those resources
10 on other avenues to get our voters out to vote.

11 Q Does the DP/VA know of people who have been
12 disenfranchised by the laws, by the photo ID law?

13 A The organization does.

14 Q How do you learn about that?

15 A Obviously this is, again, information that we track.
16 It is, we also hear about it. And, you know, it is kind
17 of, again, common knowledge. Every single time we hear
18 about someone, we do everything we can to remedy the
19 situation. But, we know we are not catching everybody.

20 Q Does DP/VA know of people who have been burdened by
21 the photo ID law? Even if they were ultimately able to
22 cast a vote?

23 A Of course. I would consider those the individuals
24 that we had to go out and to spend time and energy maybe
25 going to the registrar's office getting these IDs, you

1 know. Absolutely.

2 Q For the 2016 general election, what is DP/VA planning
3 to do to try to overcome barriers presented by the photo
4 ID law?

5 A We are particularly concerned about 2016 because this
6 will be the first presidential year that our, that the ID
7 laws have been in effect. It is pretty well known that
8 there is a lot of people that only vote every four years.
9 So this will also be the first time we will be doing
10 massive voter registration undertaking, given those
11 factors, there is going to be a significant amount of
12 individuals that this will be the first time voting with
13 these new laws in place. So we are going to have to spend
14 even more time and energy training, focusing on these,
15 doing greater education. We would love to send out
16 mailers, and currently we are kind of thinking of
17 everything we could possibly do. Again, it comes back to
18 funding.

19 Q Do Democratic voters tend to only vote in, or tend to
20 be voters who are more likely to vote in presidential
21 years?

22 A Something we are working on, but yes. If you look at
23 the historical background, especially in a state like
24 Virginia, it is kind of known the higher the turnout, the
25 more likely the Democratic Party is to win. So when less

Slutzky - direct

1061

1 people vote, it increases the odds. If you can look at
2 the last two presidential elections compared to state
3 senate and house races in 2015, those races have lower
4 turnout and voters tend to lean Republican.

5 Q If the photo ID law were not in place, would you
6 spend the time, money, and effort that you are either
7 already spending or planning to spend on the 2016
8 election?

9 THE COURT: Hasn't she answered that question?

10 MR. SPIVA: I asked about her about past efforts.
11 Now asking about the 2016.

12 THE COURT: All right. Go ahead.

13 BY MR. SPIVA:

14 Q If the photo ID law were not in place, would you
15 spend the time, money and effort that you either are
16 already spending or planning to spend on something else?

17 A We are going to spend every dollar we get. So
18 absolutely.

19 Q Now, the DP/VA is asking for the photo ID law to be
20 struck down; isn't that right?

21 A We are.

22 Q If it its struck down, wouldn't that mean that you
23 would have to engage in further efforts to educate people
24 about another change in the law?

25 A I would say we likely will, but the time and energy

1 associated with telling someone, yes, you can vote is very
2 different than the time and energy of training, you know,
3 what we have to do now with the laws in place. So some
4 training, but not nearly the amount that we would.

5 Q Thank you very much.

6 I have no further questions.

7 THE COURT: I am going to recess for lunch.

8 Before you do your cross.

9 I omitted in discussion with the lawyers to put the
10 name on the record.

11 A Of course. It is Rebecca Slutzky. Last name is
12 S-L-U-T-Z-K-Y.

13 THE COURT: Thank you very much. We will recess for
14 one hour. Come back and have cross examination. You are
15 excused until then, Ms. Slutzky.

16 Stand in recess.

17 (Recess)

18 CROSS EXAMINATION

19 (witness resumed the stand)

20 THE COURT: All right. Continue with the cross
21 examination of Mrs. Slutzky. Go right ahead.

22 MR. FINBERG: Thank you, Your Honor.

23 BY MR. FINBERG:

24 Q Good afternoon.

25 A Good afternoon.

1 Q We met before in your deposition. I am Dana Finberg,
2 one of the attorneys who is representing the Commonwealth
3 agencies, the defendants in this case.

4 A Good to see you again.

5 Q Good to see you, too.

6 You are executive director of the Democratic Party of
7 Virginia?

8 A Yes, sir.

9 Q Is it all right if I refer to that as DP/VA?

10 A That is what we do.

11 Q Okay.

12 You held the executive director position since May of
13 2015?

14 A Correct.

15 Q When did you first come to be employed by the DP/VA?

16 A With this position it was in May. I was a regional
17 director on the coordinator team in 2008, which I believe
18 falls directly under the Democratic Party of Virginia.

19 THE COURT: You say since 2008?

20 THE WITNESS: No, no, I was in 2008.

21 THE COURT: So it's a one year-one position?

22 THE WITNESS: It was six months.

23 THE COURT: Six months. Okay.

24 Go right ahead, Mr. Finberg.

25 BY MR. FINBERG:

Slutzky - cross

1064

1 Q Have you been employed in one capacity or another by
2 the Democratic Party of Virginia since 2008?

3 A No.

4 Q When did you become employed by the DP/VA?

5 A Again, this stint starting in May of 2015. I was
6 employed, I believe it was, May to November of 2008.

7 Q Okay.

8 As executive director, you run the day-to-day
9 operations of the organization?

10 A Correct.

11 Q You are in charge of the staff?

12 A Correct.

13 Q And you held the position of executive director of
14 the DP/VA when this case was filed in June of 2015, right?

15 A Correct.

16 Q You have a law degree, but don't serve in any
17 capacity as a lawyer for the DP/VA, is that right?

18 A Correct.

19 Q You are familiar with the party plan of the
20 Democratic Party of Virginia?

21 A I am.

22 Q Okay.

23 A I couldn't quote it exactly, but --

24 Q You won't have to.

25 Could you put on defendants' exhibit 448, please.

Slutzky - cross

1065

1 Do you recognize this as the Democratic Party plan of
2 Virginia's as of March 7 of 2015?

3 A I do.

4 Q Okay.

5 Let me ask you to look at section 2.1.

6 A Page?

7 Q Good question. 2.1 is on DX 448006.

8 If you look at section 2.1, and just read that into
9 the record for us, please.

10 A "Every resident of the Commonwealth of Virginia who
11 believes in the principals of the Democratic Party is
12 hereby declared to be a member of the Democratic Party of
13 Virginia."

14 Q So, if I understand this correctly, the DP/VA
15 declares people to be members of the Democratic Party of
16 Virginia if they are Virginia residents and they believe
17 in the principals of the Democratic Party, is that right?

18 A Correct.

19 Q The Democratic Party of Virginia does not have an
20 application process for membership, does it?

21 A Correct.

22 Q And the DP/VA does not charge dues for membership?

23 A Mostly correct. There are local committees, and
24 local committees do pay dues.

25 Q But if you are not a member of the local committee?

1 A Not every member pays dues. Some members -- there
2 are a dues payment system for some.

3 Q Okay.

4 And the DP/VA doesn't issue membership cards to
5 members, or otherwise notify residents of Virginia, that
6 they have been declared to be a member of your
7 organization?

8 A The party plan which is on here is publicly posted
9 and referenced, so you could argue that it is public in
10 that sense.

11 Q I'm not arguing with you. The question is, the DP/VA
12 doesn't issue membership cards, does it?

13 A We do not.

14 Q You do not otherwise notify directly residents of
15 Virginia that they have been declared to be a member of
16 the DP/VA, do you?

17 A I mean, no, we don't call each individual person up
18 and say, you are a member, if that is what you are getting
19 at.

20 Q The only way an individual would know that you
21 consider them to be a member of the party is if they went
22 to the web site, looked at section 2.1 of the party plan?

23 A No. I think that we are a constituency organization.
24 I think that members that believe in our -- individuals
25 that believe in our ideals probably believe that they are

1 members. I think if you were to walk into a random
2 shopping center and started interviewing people, you would
3 ask, are you a Democrat? Plenty of people would say yes.
4 And I would take that assertion of yes as being a member
5 of our organization. I don't think they need a membership
6 card to be able to safely answer that question.

7 Q The Democratic Party of Virginia doesn't maintain a
8 list of members, does it?

9 A There is not -- in Virginia you don't register with a
10 party affiliation. So, we do track individuals. I mean,
11 we know who our members are. I would say we don't
12 necessarily with a hundred percent accuracy have the name
13 of every single person that -- I think we -- so, yes, yes.
14 Did that answer it?

15 Q It is pretty much a pretty simple yes or no question.
16 Does the DP/VA maintain a list of current members?

17 A We have lists of individuals that we target for
18 elections, but it is not a hundred percent inclusive every
19 single person would be on that list.

20 Q Do you recall when I took your deposition?

21 A Yes.

22 Q Do you recall when I asked you about whether or not
23 the DP/VA maintained a membership list? You testified
24 that it would be an extremely burdensome process to
25 produce such a list?

1 A Yes.

2 Q Do you agree with that testimony that you previously
3 gave?

4 A I definitely do.

5 Q The membership of the DP/VA as the DP/VA defines its
6 membership includes people that might vote for Republican
7 or third party candidates from time to time; isn't that
8 right?

9 A Again, I think it is if you generally go with the
10 democratic ideals you are a member. Obviously, there is,
11 you know, somebody might chose to support a candidate, but
12 that doesn't mean they are no longer a member forever.

13 Q So, does the membership of the DP/VA as the DP/VA
14 defines its membership include people that might vote
15 Republican or third party candidates from time to time?

16 A I think they could.

17 Q Are there members of the DP/VA who support the photo
18 ID law that the DP/VA is trying to invalidate in this
19 case?

20 A Could you repeat the question?

21 Q Are there members of the DP/VA as you defined
22 membership who support the photo ID law that the DP/VA is
23 trying to invalidate in this case?

24 A I don't know that I could speak for the millions of
25 individuals, but I would say across the board the

1 Democratic Party does not support this voter ID law. I
2 can't say it is not plausible there could be one exception
3 out there, but generally speaking.

4 Q Has the DP/VA ever polled its membership to determine
5 whether there is support among the Virginia residents that
6 the DP/VA has declared to be its members for the
7 invalidation of this law?

8 A To my knowledge, we have not run a specific poll.
9 That being said, I think we certainly regularly converse
10 with our members, and from conversations myself and other
11 party members have had, there is general understanding
12 that everybody is opposed.

13 Q Everybody is opposed.

14 A I personally have never heard of a situation where
15 somebody supported the law --

16 Q Are you aware --

17 A -- unilaterally. But I am not aware of anyone.

18 Q Are you aware of Democratic delegates to the Virginia
19 legislature who have polled their constituency and found
20 that a majority of the constituency support the voter ID
21 law in this case?

22 A I was not aware of that.

23 Q Did the membership of the DP/VA get to vote on
24 whether this law suit should get filed?

25 A No.

1 Q You testified on direct exam that the DP/VA serves
2 essentially two roles, is that right?

3 A Yes.

4 Q Is that to get Democrats elected to office?

5 A Yes.

6 Q And to support Democrats once they are in office?

7 A Correct.

8 Q Is one of the purposes of the DP/VA to litigate on
9 behalf of its members?

10 A I think when there is litigation that affects the
11 party membership, the party membership in the way that
12 this legislation does, that it is important for us to step
13 in and take on that role.

14 Q Can you show me where in the Democratic Party plan it
15 says anything about litigating on behalf of the Party?

16 A To my knowledge it is not in there.

17 Q In fact, neither the steering committee nor the
18 central committee of the Democratic Party of Virginia
19 authorized the filing of this law suit, did they?

20 A There was not a formal vote; however, the steering
21 committee did vote to elect both our party chairwoman, and
22 they voted on me when I first took office to be
23 responsible for these types of decisions. And we have
24 kept them apprized of the details of this litigation on
25 all of our meetings since then. They Have been kept

1 updated throughout. But not a formal vote.

2 Q Did the DP/VA itself finance this litigation?

3 A They are not.

4 Q The Democratic Party of Virginia has not itself
5 performed any studies or surveys to quantify whether the
6 voter ID statute has disproportionately reduced voter
7 turnout to Democratic parties in Virginia; is that right?

8 A A scientific study, no. But again, I would say it is
9 the nature of what we do that we understand the effects,
10 and we see it through casual conversations and feedback
11 and the way our party works.

12 Q I think you have testified on direct that you had
13 attempted to reach out to "disenfranchised" voters?

14 A I personally have not, but individuals in the
15 organization absolutely.

16 Q The Party has?

17 A The Party has, yes.

18 Q I think you testified on direct that the DP/VA has
19 gotten in contact with voters who could potentially lack
20 valid photo IDs; that is right?

21 A Yes, they have.

22 Q How did the DP/VA come to know the identity of those
23 voters, who to contact?

24 A The Democratic Party knows who are registered voters
25 in the State of Virginia. And we generally know,

1 obviously we have the ability to identify voters who are
2 likely Democrats. And that list was compared to the DMV
3 listing, and my understanding is anyone who didn't have a
4 driver's license was put on a reach out to list.

5 Q As a matter of fact, to assist the DP/VA in its
6 outreach efforts the DP/VA got information from the
7 Department of Elections, didn't it?

8 A At the moment I am not positive.

9 Q Do you understand that the DP/VA reached out to the
10 State Board of Elections, or the Department of Elections
11 to request information to allow them to conduct outreach
12 efforts?

13 A I know that we are regularly in touch with the
14 Department of Elections. I personally have not had a
15 direct conversation with them on that. I think I would
16 assume individuals from the Party have. I just can't say
17 with certainty.

18 Q The Democratic Party of Virginia contends that it has
19 had to divert resources as a consequence of the enactment
20 of the voter ID law, right?

21 A Um hum.

22 Q And that it has had to spend time and energy,
23 resources, educating voters on the requirements of the
24 law?

25 A Correct.

1 Q And you say that this time and effort would have been
2 spent on growing, enhancing voter outreach and
3 registration?

4 A Correct.

5 Q And persuasion?

6 A Yes. Communicating with our voters with other goals
7 in mind, other than educating them on how to vote.

8 Q Okay.

9 At least in terms of the monetary cost, it is hard to
10 quantify that, right?

11 A Correct.

12 Q As part of that did the DP/VA develop media that it
13 can give to folks describing the requirements of the voter
14 ID law?

15 A We have talked in 2016 about doing direct mailings
16 with voter education based on the voter ID laws. To my
17 knowledge we have -- it is pretty significant monetary
18 amount to do those type of direct mailings. To my
19 knowledge I don't believe we have in the past, but that is
20 a thing we would like to do this year.

21 Q Between the enactment of the voter ID law and now
22 DP/VA hasn't yet expended the resources to do that?

23 A We at the state party haven't done a massive direct
24 mail piece across the state, no. Have our local
25 committees done any sort of, you know, written

1 information? I would certainly assume so. I can't speak
2 directly on, you know, a flyer or anything that I have
3 seen. But that would certainly fall in line with the text
4 of outreach we have done, and our voter protection
5 director certainly created materials and training. And,
6 you know, I can't say -- I can't give you a specific
7 example of the direct mail piece, but the likelihood that
8 there has been some sort of written material sent out to
9 some segment of the population I would say is reasonable.
10 I just don't know specifically.

11 Q So, in terms of quantifying the amount of time that
12 has been spent since the enactment of the voter ID law and
13 now developing written materials that can be handed to
14 voters to educate them about the requirements of the voter
15 ID law, you don't believe that much has been done yet?

16 A I believe there has been some done. I know our voter
17 protection director who works with our field director, so,
18 again, I don't know if they have created a piece that
19 might have gone out in the walk packets when they were
20 knocking on doors last year. I can't speak personally to
21 that. But that would certainly go in line with the types
22 of work that they have been doing. So --

23 Q Ms Slutzky, you are aware that the Virginia law
24 requiring acceptable voter IDs changed in 2012, right?

25 A Correct.

1 Q And in connection with the change of law that
2 occurred in 2012, did the Democratic Party of Virginia
3 divert time, energy and resources to educate voters
4 regarding what those new requirements were?

5 A My understanding is yes.

6 Q Yet the Democratic Party of Virginia didn't sue to
7 try to invalidate that law, did it?

8 A I don't know what specific activities they might have
9 done in 2012. I know that it increased more dramatically
10 after 2013. So I think as the laws have gotten stricter
11 so has our training and the resources that we have had to
12 effectively educate voters.

13 Q After the 2012 law was enacted changing the voter ID
14 requirements did they DP/VA sue to try to invalidate that
15 law?

16 A We did not sue in 2012 to my knowledge.

17 Q And the DP/VA was conducting voter outreach long
18 prior to the enactment of the voter ID law, wasn't it?

19 A Correct.

20 Q And it has always been a part of the mission of the
21 Democratic Party of Virginia to engage in voter outreach
22 and voter registration efforts?

23 A Absolutely.

24 Q And to some extent those voter outreach and voter
25 registration efforts have always involved an educational

1 component, haven't they?

2 A Yes.

3 However, for example in 2008 we spent a very minimal
4 amount of time doing education on how someone can vote
5 compared to this past year in 2015. I would say, as an
6 example, I would like to use the Iowa caucuses. In Iowa,
7 you know, there is videos out there on, you know, how
8 caucusing is easy and there is a lot of time and energy of
9 what that process looks like because it is more elaborate
10 and complicated. I would say now that we are in 2015 and
11 2016 we are having to take on more of those types of
12 activities than we did in previous years.

13 Q You testified on direct exam about the hiring of, I
14 think, her name is Ms Georgina -- how do you pronounce her
15 last name?

16 A Cannan.

17 Q Is that C-A-N-N-A-N?

18 A I believe so.

19 Q Okay.

20 So, you testified on direct about the hiring of Ms
21 Cannan.

22 A Yes.

23 Q There is a voter protection director for the
24 elections in 2012 prior to the enactment of the statute,
25 right?

1 A In past years we have, the Democratic Party has hired
2 either, you know, either the Party or the campaigns have
3 hired someone to do voter protection. But usually a short
4 term position that gets hired in roughly September to
5 November. Georgina has been that person in I believe '13
6 and '14, but not '12. I will double check her resume to
7 confirm that, who it was in '12.

8 Q But there was someone in 2012.

9 A I would assume so.

10 Q So there has been somebody in 2012, somebody in 2013,
11 and now in 2014?

12 A Yes. But, again, these efforts have been very
13 specifically related to those campaigns, and it is a very
14 different role, kind of basically having poll watchers and
15 the types of activities the voter protection director
16 would have done in previous cycles compared to it being a
17 year-round salaried possession. You know. There is a lot
18 more you can do in 12 months than in two months. So to
19 that extent the program has changed dramatically.

20 Q But you would agree with me, wouldn't you, that her
21 full time hiring was only brought about in part as a
22 result of the enactment of the voter ID law?

23 A Yes. I don't think it was a hundred percent.

24 Q It was not the only reason she was hired.

25 A Yes, yes. Certainly it was a significant reason.

Lichtman - direct

1078

1 Q Not the only reason?

2 A Not the only reason.

3 Q Your Honor, no further questions.

4 THE COURT: All right. Thank you, sir.

5 Any redirect?

6 MR. SPIVA: No redirect, Your Honor.

7 THE COURT: All right. Very well.

8 Thank you. You are free to go. Thank you very much
9 for coming. We appreciate your testimony.

10 THE WITNESS: Thank you, very much. Appreciate it.

11 (Witness stood aside)

12 Lichtman - direct.

13 MR. SPIVA: Our next witness will be Dr. Allan
14 Lichtman.

15 THE COURT: Dr. Allan Lichtman. Okay.

16 Raise your right hand sir, place your left hand on
17 the Bible, and face the clerk of the court:

18 ALLAN LICHTMAN

19 WAS SWORN AND TESTIFIED AS FOLLOWS:

20 DIRECT EXAMINATION

21 THE WITNESS: I have a personal issue.

22 THE COURT: Yes, sir.

23 THE WITNESS: I have a medical issue, prostate cancer
24 survivor, and I may get hit unpredictably.

25 THE COURT: Sure. All you do is raise your hand.

Lichtman - direct

1079

1 That will be my signal to call a recess. Okay?

2 THE WITNESS: Thank you, sir. It may be no issue. I
3 hope.

4 THE COURT: We will accommodate you. Glad to do it.

5 THE WITNESS: Thank you, sir.

6 DIRECT EXAMINATION

7 THE COURT: If you would identify yourself with your
8 full name and spell the last name for the court reporter
9 so we make sure we get it right.

10 THE WITNESS: Happy to do it. It is Allan J.
11 Lichtman. L-I-C-H-T-M-A-N.

12 Is there water up here?

13 THE COURT: Yes, sir, we have water.

14 You may want to spell the first name since --

15 THE WITNESS: Yes. It is A-L-L-A-N, Your Honor.

16 A. L. L. A. N.

17 THE COURT: Thank you.

18 THE WITNESS: Thank you.

19 BY MR. SPIVA:

20 Q Good afternoon. Where are you employed?

21 A I am employed at American University.

22 I actually sometimes hate to admit it, but I have
23 been employed there for 43 years. Since 1973. My one and
24 only adult job.

25 Q What is your job there?

Lichtman - direct

1080

1 A I am a distinguished professor of history.

2 Q What is a distinguished professor of history?

3 A Not something I made up. It's not a department
4 title. It is a university title, the highest academic
5 rank in the university above professor. Only three or
6 four of us out of 850 at the university.

7 THE COURT: All right.

8 BY MR. SPIVA:

9 Q Can you describe your educational background,
10 Dr. Lichtman?

11 A BA from Brandeis in 1967.

12 Spent three years as a biology major, saw the light
13 and switched to history my senior year. So science and
14 math background. And then a PhD from Harvard University
15 in 1973 with a specialty in American political history and
16 the quantitative or mathematical analysis of social
17 science information.

18 Q Can you describe what areas you published in that are
19 relevant to this litigation?

20 A Yes. I would say there are three relevant areas.

21 The first one is quantitative and historical
22 methodology. This goes back to the late 1970s when I
23 published a book in the sage series on the quantitative
24 applications in the social sciences called Ecological
25 Inference. Nothing to do with the environment, but had to

Lichtman - direct

1081

1 do with mathematical methods for drawing inferences from
2 data for political units, like wards or precincts. I have
3 also published quantitative methodological articles in
4 such journals as *Social Science History*, *Journal of*
5 *Interdisciplinary History*, *Political Methodology*, and
6 *Journal of the United States National Academy of Sciences*.

7 I have also co-authored a book on historical methods
8 called *Historians and the Living Past*. The theory and
9 practice of historical study. And I have taught both
10 quantitative and historical methodology as well as written
11 about them.

12 The second area would be the application of
13 quantitative and historical methods and research to the
14 study of American political history and current American
15 politics.

16 This approach grounds many of my books, including,
17 again, going back to the late 1970s, *Historians and the*
18 *Living Past* -- excuse me -- *Prejudice and Geo Politics*,
19 the Presidential Election of 1928, and more recently my
20 series of books on the Keys to the White House, sixth
21 edition is about to come out, predicting who is going to
22 win in 2016. As well as books such as *White Protestant*
23 *Nation*, as well as the *Rise of American Conservative*
24 *Movement*. And my most recent book, *F.D.R. and the Jews*.
25 I have also published articles on these topics in journals

Lichtman - direct

1082

1 such as the American Historical Review, the Journal of
2 Social History, International Journal of Forecasting, The
3 International Journal of Information Systems, and others.

4 THE COURT: Is there any challenge to the Doctor's
5 credentials?

6 MR. HEARNE: No, Your Honor.

7 THE COURT: He will be received as an expert witness.

8 Go right ahead.

9 BY MR. SPIVA:

10 Q Thank you, Your Honor.

11 Have you published or had expertise in the
12 application of social science methodology in voting rights
13 and redistricting issues?

14 A Yes. In many different contexts. Very quickly, I
15 have published articles in the Journal of Legal Studies,
16 Evaluation Review, the Journal of Law and Politics, and
17 others on that topic.

18 Q Have you previously served as an expert in other
19 voting rights cases?

20 A Yes, I have.

21 Q How many? Approximately, how many times?

22 A I haven't counted, but I would say more than 80
23 voting rights cases of various types since the 1980s.

24 Q Have you worked on behalf of plaintiffs and
25 defendants?

1 A I worked for plaintiff and defendants. I have worked
2 for independent commissions. I have worked for state and
3 local jurisdictions. I have worked for the U.S.
4 Department of Justice. I have worked for civil rights
5 groups. I have worked for private plaintiffs. I have
6 worked for Republican and Democratic interests insofar as
7 they can be defined in various cases.

8 THE COURT: Okay. Next question.

9 BY MR. SPIVA:

10 Q Can you describe some of the work for Republican
11 interests?

12 A Yes. In 1990 I was an expert for the Massachusetts
13 Republican redistricting task force. I also was working
14 in concert with Republican interests in the famous
15 DeGrandy case in Florida that went to the Supreme Court,
16 sitting with Benjamin Ginsberg, the head of the Republican
17 redistricting task force.

18 And the longest job I ever did as a consultant was
19 for the then Republican mayors Giuliani and Bloomberg in
20 New York City. I was their voting rights adviser in their
21 effort to create non-partisan elections. Quite a thing
22 for New York City. And a lot of opposition, of course,
23 was the Democratic Party that controlled City politics.

24 Q Had you previously testify on the issue of intent in
25 legislative enactment?

Lichtman - direct

1084

1 A Yes, I have. I think about four times, both in voter
2 ID cases, redistricting cases, and in North Carolina, a
3 case that combined voter ID with a number of other issues.
4 And way back in the '80s in the landmark Garza case. I
5 wasn't directly testifying on intent, but my testimony
6 bore on that.

7 Q Have you been accepted by courts as an expert on
8 intent?

9 A Yes. In four, all four cases in which I directly
10 testified on that.

11 Q Please tell us in a summary fashion to begin with
12 what issues you were asked to address as an expert witness
13 in this case.

14 A Yes. I was asked primarily to address the issue of
15 whether the voter identification law, SB 1256 in 2013, was
16 adopted and implemented by the Commonwealth of Virginia
17 with the intent to discriminate against African-American
18 voters and would-be voters by placing disparate burdens
19 upon this minority group when it came to voting
20 opportunities relative to whites.

21 I would also say, while I mention adopted and
22 implemented, I didn't just mean to quickly pass over
23 implemented. That is a very important element here
24 because, as they say, the devil is in the details.

25 THE COURT: You are going -- you just answer the

Lichtman - direct

1085

1 questions he asks, okay? I know you have a lot to say, I
2 respect you very much, but please answer the questions
3 counsel gives you. Okay?

4 Go ahead.

5 THE WITNESS: And I was also asked to look at the
6 so-called Senate factors that were part of the totality of
7 circumstances, and to respond to any testimony, reports,
8 analysis --

9 THE COURT: All right.

10 THE WITNESS: -- by defendants' expert.

11 THE COURT: Go ahead.

12 BY MR. SPIVA:

13 Q What information did you rely on in conducting your
14 analysis, Dr. Lichtman?

15 A I relied on the kind of standard information that
16 historians and political analysts rely on. Data from the
17 Virginia Department of Elections data base. Scholarly
18 books, articles, reports, newspaper, journalistic
19 articles, demographics, socioeconomic information,
20 election returns, e-mails, court opinions, briefs,
21 government and organizational reports, academic studies
22 and scientific surveys.

23 Q What methodology did you follow in your analysis?

24 A I relied on my standard methodology that I have used
25 in numerous historical studies which is consistent with

Lichtman - direct

1086

1 the methodological guidelines by the U. S. Supreme Court
2 in the Arlington Heights case where the court focused on a
3 number of issues, discriminatory history, discriminatory
4 impact, sequence of events, procedural or substandard
5 deviations, and contemporary statements.

6 Q Did you attempt to draw legal conclusion in your
7 work?

8 A I did not. I simply drew substantive conclusions as
9 I would in any voting rights case.

10 Q How did your work differ from conclusions that the
11 Court could reach for itself?

12 A Well, I would certainly expect the Court to assess
13 and evaluate my work and compare it to the work of
14 defendants' experts, and one of the defendants' experts,
15 Dr. Owen, engaged the issue of intent, drew her own
16 findings about intent, but I would not expect the Court to
17 do the research, the analysis, and the writing that goes
18 into my reports and testimony. I presented more than 35
19 statistical charts and tables in my report.

20 I analyzed a wide range of primary source materials
21 ranging from e-mails to legislative debates. I
22 scrutinized scientific surveys, academic studies, reports,
23 and election returns and put it together in a narrative
24 for the Court to weigh and assess and draw legal
25 conclusions from.

Lichtman - direct

1087

1 Q Have you analyzed issues of intent in your scholarly
2 work?

3 A Oh, numerous times. You would have to shut down
4 historical scholarship if you shut down analysis of
5 intent. This includes, of course, my two recent books on
6 the Rise of the American Conservative Movement, and F.D.R.,
7 both of which won major national awards.

8 Q Can you briefly summarize your overall findings in
9 this case?

10 A Yes. To do it really quickly. My analysis of
11 historical and quantitative evidence indicates that both
12 the enactment of SB 1256 and the interpretation of SB 1256
13 the following year, indicate discriminatory intent in both
14 the adoption and the implementation of this law.

15 In addition, I found that, I think, eight of nine of
16 the Senate Factors that we are guided to look at by the
17 courts apply here in the Commonwealth of Virginia.

18 Q Did any of the reports submitted by experts for the
19 defendants cause you to question any of these findings?

20 A They did not.

21 Q I would like to now turn to detailed analysis. Did
22 you find that there is a history of discrimination against
23 African-Americans in Virginia?

24 A I did.

25 MR. HEARNE: Your Honor, it appears the witness is

Lichtman - direct

1088

1 reading from prepared remarks. And if they are exhibits
2 or his report, then that would be fine, but if it could be
3 identified. That being said, he appears to be reading
4 something in the record. If it is something we have not
5 been provided, I would like to be provided that.

6 MR. SPIVA: These are his own --

7 THE WITNESS: Sorry.

8 THE COURT: It may be. But I think he ought to set
9 them aside and testify from his own knowledge. If he
10 needs to refresh his recollection, I am sure you can do
11 that.

12 MR. SPIVA: Sure. Yes. These are his own notes.

13 THE WITNESS: Just my notes, excerpts from my
14 reports. As you can see, I am not reading.

15 THE COURT: If you need to refresh your recollection,
16 you can do so, but you need to testify independently.

17 Go ahead.

18 BY MR. SPIVA:

19 Q And what were your findings with respect to the
20 history? First of all, have you done something separate
21 and apart from what Dr. Smith has already provided to the
22 Court?

23 A Dr. Smith, of course, did a lot of historical work.
24 What I provided in my supplemental report on pages 40 and
25 41 was some recent examples that go along with the longer

Lichtman - direct

1089

1 history of racial discrimination. I am not going to read
2 them all, but will briefly summarize them. They had to do
3 with many years of pushing for restrictive voter ID laws.
4 They had to do with court findings that the post 2010
5 congressional redistricting plan violated the Constitution
6 because of a racial gerrymandering in congressional
7 districting. That was reaffirmed after the Alabama
8 decision came down from the Supreme Court. I was an
9 expert witness in that Alabama case, so I am very familiar
10 with it. And also pointed out that recently, as well,
11 Republican members of Congress from Virginia have not been
12 supportive of efforts to restore the pre-clearance
13 provisions of the Voting Rights Act in a way that comports
14 with the United States Supreme Court striking down of the
15 formula for section V of the Voting Rights Act.

16 Q Does Virginia history of racial discrimination have a
17 present-day manifestation from a socioeconomic standing of
18 African-Americans and whites?

19 A Yes, it does. I have done extensive socioeconomic
20 analysis of factors that are standard in gauging such
21 things, and factors that bear directly upon voting and
22 upon voter ID laws, Your Honor.

23 Q Are these disparities quantified in tables one
24 through four and charts one through eight --

25 A That is correct.

Lichtman - direct

1090

1 Q -- of the expert report?

2 A Yes.

3 Q If we could turn to your initial report, which is
4 Plaintiffs' Exhibit 215. All the expert reports, as I
5 understand it, Your Honor, have been received in evidence.

6 THE COURT: What was the number again?

7 MR. SPIVA: Sorry. I misspoke. I gave you the
8 rebuttal report number. It is actually Plaintiffs'
9 Exhibit 212.

10 THE COURT: 212. That will be received without
11 objection.

12 MR. FINBERG: Yes, Your Honor.

13 THE COURT: It will be received.

14 (PX- 212 was offered and
15 received in evidence)

16 BY MR. SPIVA:

17 Q If we could turn -- first of all, Dr. Lichtman, take
18 a quick -- you have the hard copy up there, do you need --

19 A I think I have a hard copy, and I see what is on the
20 screen.

21 Q Okay.

22 Does that appear to be your initial report in the
23 case?

24 A Yes.

25 Q Let me ask you to turn on the screen to table one,

1 which is on page seven of your initial report.

2 A Yes, I see it.

3 Q Actually got the wrong page. It is page six.

4 So, can you explain your findings as set forth in
5 table one?

6 A Certainly. A lot of findings there, but let me begin
7 by indicating this comes from the American Community
8 Survey, official survey by the U.S. Census for 2009 to
9 2011. And the reason, Your Honor, I use that particular
10 survey was it was information available at the time of the
11 adoption of SB 1256 rather than information that was
12 produced later.

13 This looks at standard economic measures including
14 median household income, per capita income, poverty rates,
15 unemployment, and asset poverty.

16 Asset poverty is probably the only one that is a
17 little odd, but as I indicate in the footnote there, it is
18 the lack of sufficient net worth to subsist at the poverty
19 level for three months without access to income. In other
20 words, we often focus on income, but assets are very
21 important as well because they are a cushion if you lose
22 your income.

23 All of these measures, I'm not going to go through
24 them individually, but they all show essentially the same
25 picture; that is, African-Americans have much lower income

Lichtman - direct

1092

1 than whites. They are far more likely to be in poverty,
2 poverty rate is more than double. They are far more
3 likely to be unemployed. The unemployment rate is about
4 double. And they are far more likely to be in asset
5 poverty. Asset rate is about triple.

6 Q Turning to chart one on page 67. Can you briefly
7 describe what that -- what you are conveying with that
8 chart?

9 A That just puts it in graphic form. People are often,
10 you know -- I find this a lot in my teaching -- a little
11 phased by tables with numbers. And this is the same
12 information in pictorial form that just shows how large
13 the gap is in this case on income levels between
14 African-Americans and whites in Virginia.

15 Q In chart two on page eight, is that the asset poverty
16 rate, unemployment rate shown?

17 A It is actually three things.

18 Q Okay.

19 A I couldn't put it on the other chart because the
20 other chart was in dollars. This is in percentages. And
21 this, again, for poverty, unemployment, and asset poverty
22 graphically shows how large the gap is in Virginia between
23 African-Americans and whites.

24 Q Turn to table two on page nine, and explain what that
25 shows.

Lichtman - direct

1093

1 A Yes. This is education measures. Very important in
2 dealing with voting and voters IDs. It shows most blacks
3 and whites are high school graduates, as we might expect
4 in Virginia, but that there is still a considerable gap
5 between blacks and whites when it comes to college degrees
6 or more, there is a very large gap between blacks and
7 whites in Virginia. About double.

8 And when it comes to scores, this is just indicative
9 of those below a basic math capacity. It is almost triple
10 for eighth grade African-Americans as opposed to whites.
11 And the drop-out rate from nine to 12 is slightly more
12 than double. For African-Americans than whites. So there
13 are pretty severe educational barriers being faced by
14 African-Americans, unfortunately, in the Commonwealth of
15 Virginia versus whites.

16 Q Chart three on page ten. Is that just a graphic
17 representation of what you were just talking about?

18 A It is a graphic representation of part of it. It is
19 that part that deals with percentages. It shows
20 African-Americans are slightly lower, but not dramatically
21 so for high school graduates, but dramatically lower when
22 it comes to college degrees or more.

23 Q And what is chart four on page eleven showing?

24 A Well, it just shows the percentages below basic math
25 and the drop-out rate, showing that the African-American

Lichtman - direct

1094

1 percentage lacking basic math at the eighth grade is
2 nearly triple that of whites. And the drop-out rate,
3 those who don't get out of high school, is slightly more
4 than double for African-Americans than whites.

5 Q In table three on page 12, can you explain what this
6 conveys?

7 A Yes. Now we are getting into another area covered by
8 the census, and that is housing measures. Kind of got a
9 separate census of housing and population.

10 I am looking at a few things here. The
11 owner-occupied housing, that is, what percentage of blacks
12 and whites own as opposed to rent? And you can see it's,
13 about 50 percent higher for whites. Median home value is
14 substantially higher for whites. And I would like to
15 highlight the next one because I think it is particularly
16 pertinent to our analysis of voting and our analysis of
17 voter ID laws in the Commonwealth. And that is percent of
18 households with no vehicle available. And it is nearly
19 triple for African-Americans as compared to whites.

20 And percent with no telephone service, it is small
21 for both, but it is about twice as high for
22 African-Americans as compared to whites.

23 Q What about chart five on page 13?

24 A That looks at the home value. Showing, you know,
25 that the home value of whites is substantially higher for

Lichtman - direct

1095

1 its median, that is the midpoint, as compared to
2 African-Americans.

3 Q How about chart six on that same page?

4 A Yes. Chart six looks at those other measures, home
5 ownership, about 50 percent higher. Lack of vehicle in
6 the household, almost triple. And the lack of telephone
7 in the household, about double.

8 Q In table four on page 14, what is that representing?

9 A This looks at some basic health measures. And first
10 it looks at those who don't have health insurance. Nearly
11 double for African-Americans as compared to whites.

12 The life expectancy of African-Americans is a bit
13 lower than that for whites, although births are about
14 twice as high, nearly, for African-Americans than whites.
15 And the infant death rate per one thousand births is more
16 than double.

17 So you have got other burdens on African-Americans
18 relative to whites in the Commonwealth with respect to
19 availability of health insurance -- big issue these
20 days -- as well as other health measures.

21 Q Just the last two for now. I think that they are
22 just representations in graphic form, but look at chart
23 seven and chart eight. If there is something to add, that
24 is fine?

25 A No. It is representation in graphic form if you

Lichtman - direct

1096

1 actually want to see the picture.

2 Q Okay.

3 A And the same thing for chart eight on the other
4 health measures. Again, just showing it in graphic as
5 opposed to having, trying to manipulate numbers in your
6 head.

7 Q Did those tables and charts relate to the Senate
8 Factors at all, Dr. Lichtman?

9 A I think they relate to two things. As I said, they
10 relate to voter ID, and voting, and clearly this is one of
11 the Senate Factors that is posed for us to analyze. It's
12 lingering effects of discrimination in terms of
13 disparities on these kinds of socioeconomic measures.

14 Q Did you next consider the sequence of events leading
15 to the adoption of SB 1256?

16 A I did.

17 Q What did you consider first?

18 A Well, what I first considered in terms of the
19 sequence of events was the history, at least recent
20 history, of voter ID laws in the State of Virginia. And
21 before that, even in the bigger context, I also considered
22 the underlying politics of it.

23 In terms of voter turnout, and in terms of partisan
24 politics in voting. That is the bigger context of the
25 specific sequence of voter ID laws.

Lichtman - direct

1097

1 Q What was the first sequence of political events that
2 you analyzed?

3 A The first sequence of political events that I
4 analyzed is in my, report -- I believe starts on page
5 18 -- and that is the patterns of voter turnout by race
6 and ethnicity from about 2004, 2006 to the present.
7 Turnout is part of the life blood of politics. The two
8 fundamental elements of electoral politics are getting
9 people to vote for you, and getting the kind of people who
10 vote for you to turnout to vote.

11 Q Is this represented in table five of your report?

12 A That is correct.

13 Q What does table five show?

14 A Table five shows several things.

15 First of all, if you look at the U.S. Senate
16 elections, table five shows that there has been a steep
17 decline in white turnout relative to minority turnout in
18 the Commonwealth since 2006. Let me explain these turnout
19 numbers.

20 These turnout numbers are not the rate at which the
21 various groups turn out. There is something much more
22 important. They are the life blood of politics, and that
23 is, of the entire electorate who shows up in these
24 elections, what percentage of the electorate is white,
25 what percentage of the electorate is black, what

Lichtman - direct

1098

1 percentage is Hispanic, and others. And this is taken
2 from exit polling, a very standard source for looking at
3 turnout and does.

4 First, if we compare U.S. Senate to U.S. Senate
5 elections we can see that back in 2006 the white share of
6 the U.S. Senate electorate was 78 percent. That went down
7 to 70 percent in the 2012 U.S. Senate election, which may
8 not be entirely comparable, of course, because 2006 is a
9 mid-term election year and 2012, of course, is a
10 presidential election year when you might expect more
11 minorities to show up. However, we can fast forward to
12 2014, the most competitive Senate election in the country,
13 and white turnout remains constant at 70 percent, and the
14 other numbers are roughly the same.

15 We can see black turnout rises from 16 percent back
16 in 2006 to 20 and 19 percent, essentially, with rounding
17 errors in 2012 and 2014. And we can see, not surprisingly
18 in the Commonwealth, as elsewhere, the most rapidly rising
19 component of the turnout is Hispanic.

20 So over time in U.S. Senate elections we have three
21 patterns. Smartly falling white turnout as a component of
22 the electorate, rising black turnout as a component of the
23 electorate, and rising Hispanic turnout as a component of
24 the electorate.

25 The next element of the table, which should be

Lichtman - direct

1099

1 separately examined, is gubernatorial elections. In the
2 Commonwealth, of course, gubernatorial elections are not
3 entirely unique, but a little unusual in that they are
4 held on the off year. We can see from the off year of
5 2009 to the off year of 2013 a similar pattern of
6 declining white and rising minority turnout.

7 The white component of the electorate drops. That is
8 from 78 percent to 72 percent. The black component rises
9 from 16 to 20. We don't have for 2009 the other groups
10 parsed out, but by simple subtraction you can see the
11 other groups would be slightly rising as well.

12 And, of course, as you get into these lower white
13 turnout elections, like 2012 and 2013, 2014, you see
14 Democratic victories.

15 Q What does table six show on the next page related to
16 the patterns of turnout for whites and minorities?

17 A Table six does the same thing for presidential
18 elections. And we see a similar, although not quite as
19 stark a pattern in presidential elections, because even
20 going back to 2004 there is a pretty robust minority
21 participation in presidential elections. Minorities tend
22 to turn out more robustly in presidential elections
23 relative to whites than in mid turn elections or in off
24 year elections.

25 So we can see the decline, more modest, but it is

Lichtman - direct

1100

1 there. 2004 whites comprise 72 percent of the electorate.
2 In 2012, 20 percent. Excuse me. 70 percent in both 2008
3 and 2012. And not a whole lot of change in the black
4 component. And, again, a rise in the Hispanic component.

5 So, similar, but not as sharp a pattern for
6 presidential elections.

7 Q Did you analyze the political implication of these
8 turnout changes?

9 A Yes, I did.

10 Q How did you do that?

11 A I used exit polls again, Your Honor, because exit
12 polls not only gage turnout, they also gauge how various
13 groups in the electorate -- but not just racial groups --
14 but age groups, income groups, education groups, a
15 standard tool in political history and political science.

16 Q Can you turn to Table 7, please.

17 Would you look at Table 7 in Chart 9 up at the same
18 time, Dr. Lichtman? We can put them both on the screen.

19 THE COURT: Let me ask you a question.

20 THE WITNESS: Certainly.

21 THE COURT: In determining these various percentages,
22 your exit polls, did you do an exit poll at every voting
23 precinct, or did you just take a sample and extrapolate
24 from that?

25 THE WITNESS: I didn't do the exit polling. The

Lichtman - direct

1101

1 polling is done in every year by a single group that is
2 independent of everybody. It is called Edison Research.
3 And they are obviously not going to be at every single
4 polling place. They are going to be at a representative
5 sampling of polling places.

6 THE COURT: Fine. Thank you, Doctor.

7 THE WITNESS: Thank you.

8 THE COURT: Go ahead.

9 BY MR. SPIVA:

10 Q Does table seven in chart nine, is that part of the
11 analysis of the political implications of these turnout
12 changes?

13 A That is correct.

14 Q Can you explain?

15 A Yes. I don't think these charts should be a big
16 surprise to anyone familiar with political patterns in the
17 Commonwealth. They are a little hard to see. Maybe we --

18 Q One at a time?

19 A I am having trouble seeing.

20 Q Start with table seven?

21 A Yes, I think maybe so.

22 Q Table seven, make it a little bit bigger.

23 A I won't go through every number. I will look at some
24 of the summaries. These are rounded numbers, of course.
25 You know, they are not exact to the penny, but they tell a

1 picture.

2 You can see here that Republicans in the Commonwealth
3 are dependent on white voters. On average of 59 percent
4 of whites cast their ballots for Republican candidates.
5 That includes president, U.S. Senate, and governor. Only
6 one is kind of a blow-out election in 2008 when Republican
7 candidates get less than 56 percent support from the white
8 electorate.

9 Sometimes we talk about the political base, Your
10 Honor, of political parties. Well, the political base of
11 the Virginia Republican Party is among white voters. We
12 can see very sharp contrasts when we turn to
13 African-Americans, and less sharp, but still clear
14 contrast when we turn to Hispanics and Asians.

15 Basically African-Americans are about 90 percent
16 Democratic in their voting loyalty on average, voting only
17 nine percent for Republican candidates.

18 Q All right.

19 A That is about a 50 percentage point gap. That is a
20 huge gap. And then we see for Hispanics and Asians they
21 are part of the Democratic base, although not as
22 monolithically Democratic, but still overwhelming in a
23 majority at about a third, almost a 27 percentage point
24 gap.

25 So those turnout numbers have real political

Lichtman - direct

1103

1 significance. The more whites go down in the component of
2 the electorate, relative to minorities, the more that
3 hurts Republicans and helps Democrats, simply put.

4 Q In terms of chart nine, how does that play in that
5 analysis?

6 A Chart nine. It's the same thing. It just gives you
7 a picture and, you know, the picture up there is not quite
8 60 percent. I think it is 59 something.

9 Q Okay. This is basically in graphic form?

10 A Yes, just graphically shows the major differences,
11 particularly between African-Americans and whites. Some
12 thing that we saw in the other table.

13 Q Okay.

14 A It is about a 50-point gap.

15 Q All right.

16 Move to table eight. Explain what significance that
17 has.

18 A Yes. It is a little complicated. I will really cut
19 to the chase on this table.

20 As we saw, there is a 50-point gap between whites and
21 African-Americans, about slightly more than 25 percent
22 point gap between Asians and Hispanics and whites when it
23 comes to partisan voting in Virginia.

24 But as I mentioned a moment ago, the exit polls also
25 include information on other demographic groupings in the

Lichtman - direct

1104

1 electorate that at least potentially have political
2 significance. Men versus women. I don't mean that in the
3 battle of the sexes. Age groups. High school versus only
4 college graduate. Income levels. And while all of these
5 have some political resonance, none come close to the
6 gaps, not just for blacks and whites, but for whites and
7 any minority. Biggest gap is an age gap of about ten
8 points. 41 percent versus 51 percent Republican for young
9 people versus people of my age or older. That compares to
10 much larger gaps.

11 So if you are looking at a gauge of what makes
12 partisan politics in the Commonwealth of Virginia, it is
13 not any of these other things. It is race. That is the
14 most fundamental divide politically. That is what really
15 matters between Republicans and Democrats. And
16 particularly the racial gap between whites and
17 African-Americans. Not just because it is the widest, but
18 because by far and away African-Americans are the largest
19 minority voting block in the Commonwealth.

20 Q What do you conclude from these recent patterns of
21 turnout and partisan alignment?

22 A What I conclude from these is, first of all, none of
23 this can possibly be lost on Republicans in Virginia.
24 This is well-known information. Politicians live and die
25 on this kind of information, turnout and voting.

Lichtman - direct

1105

1 And they could not miss the fact that the demography
2 of voting has been cutting against them, and that they
3 could reap significant political benefits by limiting the
4 voting of minorities, particularly the voting of
5 African-Americans relative to whites.

6 And so there is this motivation here for such
7 limitations.

8 Q Did you next consider specific decision-making by
9 Republicans in Virginia regarding voter photo ID laws?

10 A Yes, I did.

11 Q What did you consider first?

12 A Well, the first thing I considered was a very
13 important distinction conceptually and practically when it
14 comes to voter ID laws, and that is the distinction
15 between strict and non strict voter ID laws. This has
16 nothing to do with the particular components, that is,
17 what IDs are allowed, what IDs are not. It rather has to
18 do with the options available or not for a voter who does
19 not have an authorized ID. In a non-strict state there
20 are alternatives. Even without a acceptable voter ID in a
21 non-strict state, you could cast a regular ballot or cast
22 a provisional ballot that could be counted without you
23 having to take any more steps. For example, in states
24 like South Carolina and North Carolina if you don't have a
25 requisite ID you could still cast a regular ballot by

Lichtman - direct

1106

1 signing an affirmation of reasonable intent, it is called.

2 Why couldn't I get an ID? Transportation problems,
3 medical problems, a whole range of it. That is a
4 non-strict example. Virginia used to have a non-strict
5 option under pre-2012 law. And that is, you could sign an
6 affirmation of identity at the polls and vote.

7 Now, we move to the strict. And under the strict
8 voter ID if you don't have an acceptable voter ID,
9 whatever it may be, and whoever the election official
10 makes that decision, because it is not as if there is some
11 absolutely objective template up there. You have only one
12 option, and that is to vote what is called a provisional
13 ballot, ballot that may or may not count. And to make it
14 count, you take two steps. You have to get an acceptable
15 ID, and there are different procedures in different states
16 for doing that. And then you have to return that
17 acceptable ID to the polls, the election officials have to
18 agree that it is acceptable, and if all of that is
19 fulfilled, your provisional ballot can be counted. If
20 that is not fulfilled, your provisional ballot will not be
21 counted and you are, in effect, disenfranchised in that
22 election.

23 Q Why is that distinction important between a
24 non-strict and strict ID law?

25 A It is critically important because it affects how you

Lichtman - direct

1107

1 can make your vote count. It directly affects the
2 implication of a voter ID law upon the voter.

3 I just finished testifying in the North Carolina
4 case. And right before that case North Carolina actually
5 changed its law from strict to non-strict, saying this
6 makes the law much more acceptable because now poor
7 people, minorities, can sign a reasonable impediment and
8 will not be disenfranchised. That was a big debate in
9 that litigation in which I was involved, and a big change
10 in the law.

11 Q Thank you.

12 In '96 did Virginia enact a voter ID law?

13 A It did.

14 Q What did that law involve?

15 A Well, it was not a photo identification law. The
16 identification laws don't have to be photo. You could
17 present things like utility bills, government pay checks,
18 voter registration cards, which are not photo. And it was
19 not strict. That is, you could sign an affirmation of
20 identity even if you didn't have one of the many available
21 photo or non-photo identifications that would enable you
22 to vote in the Commonwealth, Your Honor.

23 Q What followed in terms of proposed legislation to
24 change the 1996 law?

25 A Well, there was a lot of push by Republicans in the

Lichtman - direct

1108

1 state legislature to do two things; eliminate the
2 non-photo option so it would become a photo voter ID law,
3 not a non-photo voter ID law; and to eliminate the
4 affirmation of identity option so that it would become a
5 strict photo voter ID law.

6 Q Were there proposals for this in or around 2010?

7 A Yes. And there was a bill, I think it was called HB
8 498, if I remember correctly, introduced at the time. And
9 I think there was a divided government then, so the
10 Democrats in the House killed the legislation. So as of
11 2010 you still had the old 1996 non-photo, non-strict law
12 in force.

13 Q What changed after that?

14 A Well, several things changed after that.

15 First of all, Virginia elected a Republican governor.
16 And the Republicans gained control of the legislature by
17 2012.

18 So the political complexion of the decision-makers
19 switched from mixed to reasonably unified Republican. I
20 believe it was pretty close in the Senate, almost equally
21 divided. But with the deciding vote going to the
22 Republicans.

23 Q What happened in 2012?

24 A Yes, it is a pretty complex story. I am not going to
25 try to relate it all. But, basically two bills came out

Lichtman - direct

1109

1 of the legislature. I think the one that was ultimately
2 enacted -- essentially identical, called SB 1, to the best
3 of my --

4 THE COURT: What year was this?

5 THE WITNESS: This was 2012, Your Honor.

6 THE COURT: Go right ahead.

7 THE WITNESS: Yes.

8 And basically what these bills did, was they didn't
9 create a photo voter ID law. They maintained the option
10 to use non-photo forms of ID; government pay checks, bank
11 statements, utility statements, among others.

12 But this is why this distinction is so important,
13 they moved from a non-strict to a strict form of voter ID
14 law. That is, they eliminated the option to vote if you
15 didn't have an acceptable ID by an affirmation of
16 identity. These bills, of course, then went to the
17 governor.

18 BY MR. SPIVA:

19 Q How did the governor respond to the legislation?

20 A Again, it is complex. He had a number of amendments
21 and suggestions, many of which were adopted. But there
22 was one critical recommendation of the governor that was
23 not adopted. That was, in effect, to have a non-strict
24 option in the 2012 voter ID legislation through something
25 called signature comparison. That is, if you cast a

Lichtman - direct

1110

1 provisional ballot and signed it, they could compare your
2 signature on the registration rolls. If there was
3 reasonable consonance in the signatures, that provisional
4 ballot would be counted. So, in other words, there was an
5 option, as in non-strict states to count a provisional
6 ballot without the voter actually having to take another
7 step. That was rejected by the legislature, and so in its
8 final form the 2012 legislation was non-photo, but strict.

9 Q What else did the governor do?

10 A The governor also ordered voter registration cards to
11 be sent out. And registrars to remind, contact voters who
12 were voting provisionally, and remind them of the law's
13 requirements. But there is no actual requirement that
14 registrars do this. So you had differences across the
15 state in what registrars were actually doing.

16 Q Was this -- at that point was section IV of the
17 Voting Rights Act still enforceable, in effect?

18 A You mean section V, the pre-clearance section.

19 Q Yes, but section IV was --

20 A IV right, of course. Yes. At this time obviously
21 this law, or any new law affecting elections and voting
22 had to be pre-cleared by the United States Department of
23 Justice because Virginia was a pre-clearance state under
24 the Voting Rights Act. And the burden of proof was on the
25 State of Virginia.

Lichtman - direct

1111

1 That is, Virginia had to demonstrate to the
2 satisfaction of the United States Department of Justice
3 that this new law, or any new law, did not, did not do one
4 of two things. Did not retrogress minority voting
5 opportunities. In other words, turn back minority voting
6 opportunities. And was not enacted with the intent to
7 discriminate against minorities. So, Justice could fail
8 to pre-clear a law either because it was retrogressive or
9 because it was intentionally discriminatory. If that
10 happened, the state still had the option of going into the
11 D.C. courts and seeking a judgment from courts to overturn
12 the lack of pre-clearance.

13 Q Was the 2012 law pre-cleared?

14 A It was. It was, I believe pre-cleared in August of
15 2012 in time for the presidential and other elections that
16 took place that year.

17 Q Obviously the presidential election in Virginia was
18 that President Obama won the electoral votes in Virginia
19 in 2012, and Tim Kaine won the Senate race. What were the
20 implications of this election?

21 A You know, there is the old saying that elections have
22 consequences. And this election had a lot of
23 reverberating consequences in the Commonwealth of
24 Virginia.

25 First of all, it was the first time since 1948 the

Lichtman - direct

1112

1 Democrats had won consecutive presidential elections, with
2 Obama winning in '08 and '12. Last time that happened was
3 Franklin Roosevelt in 1944, Harry S. Truman in 1948.

4 Q With respect to Virginia.

5 A Only with respect to Virginia, of course, confirming
6 that presidential elections in Virginia had become a swing
7 state. Highly competitive. And, of course, a Democrat
8 also won an open United States Senate seat and won it
9 pretty handily, I think Kaine by about six points. And
10 moreover, apropos of what we are looking at here,
11 Republicans were very concerned with what they saw as this
12 juggernaut Democratic turnout machine, particularly in the
13 minority community, and particularly among young people.

14 MR. HEARNE: Your Honor, in terms of the witness'
15 responses or conclusions of Republican's feared for a
16 juggernaut, there has been no foundation laid for that
17 kind of speculation.

18 THE COURT: I am not accepting it as fact. I am
19 accepting it as something he concluded in drawing his
20 ultimate conclusion. Not taking it as a fact, just his
21 view.

22 MR. HEARNE: Thank you.

23 THE COURT: I understand.

24 THE WITNESS: I was about to document it.

25 THE COURT: I am not going to let you conclude things

Lichtman - direct

1113

1 like that, Doctor.

2 THE WITNESS: I understand. That is why I was going
3 to turn to my documentation.

4 THE COURT: You can do that as you wish, but I am not
5 going to let you testify what the intent was of the
6 reaction of the Republican party.

7 THE WITNESS: I understand.

8 THE COURT: Okay.

9 THE WITNESS: History --

10 THE COURT: Not out of disrespect, but I am just
11 putting some limitations on you. All right?

12 THE WITNESS: Of course, Your Honor. If I may
13 finish.

14 THE COURT: Yes. Sorry. Go ahead.

15 THE WITNESS: Thank you very much.

16 I just saw yesterday an e-mail from Republican
17 Congressman Rob Wittman who had met with --

18 MR. HEARNE: Your Honor, that is not in evidence,
19 what he is referring to is a --

20 MR. FINBERG: It is the e-mail we talked about.

21 THE COURT: The objection is sustained. You may not
22 publish that. You can certainly consider it, but you
23 can't publish it in the record. All right. Okay.

24 MR. SPIVA: We were not intending to, but as a expert
25 I think, Your Honor --

Lichtman - direct

1114

1 THE COURT: He can rely upon it, but not publish it
2 in the record.

3 BY MR. SPIVA:

4 Q We are not intending to.

5 A Thank you. I was going to say, this e-mail is pretty
6 explicit. It talks about the sophisticated voters
7 registration and turnout efforts of the Democrats. It
8 talks about Hispanic turnout being a significant part.
9 And it talks about how the Obama folks are reaching into
10 youth, and particularly youth, with minority community
11 ties. So it directly relates to the issue of the response
12 to what is politically happening in Virginia, and at least
13 the assessment of some within the Republican party that
14 this is tied to turnout efforts, successful turnouts
15 efforts by Democrats and particularly the successful
16 turnout efforts by Democrats, Your Honor, within the
17 minority community.

18 THE COURT: Okay, sir. Go ahead.

19 BY MR. SPIVA:

20 Q What then followed this election, the 2012 election
21 with respect to voter ID, Dr. Lichtman?

22 A Yes. Something, you know, that really caught my eye
23 as a political analyst and historian. The 2012
24 legislation had just been pre-cleared in August of 2012.
25 Of course you know the public pre-cleared document talked

Lichtman - direct

1115

1 about how effective this law was in meeting the twin
2 objectives of safeguarding the ballot and making sure that
3 nobody gets disenfranchised. But then what we have is
4 less than a half a year later Republicans in the state
5 legislature led by Senator Mark Obenshain -- I hope I am
6 pronouncing that correctly -- introduced a brand new bill.
7 Not just an amendment of the 2012 legislation, but SB
8 1256, which represented an entirely different type of
9 voter ID law. Because it now moved to a strict photo
10 voter ID law eliminating such readily-available non-photo
11 IDs as utility bills, bank statements, pay checks,
12 government checks, et cetera.

13 Q Let me direct your attention to page 26 of the
14 initial report. Plaintiffs' Exhibit 212. Does this
15 reflect a list of the types of ID that were permissible
16 under the 2013 photo ID law?

17 A Yes. With one small caveat, which I guess I will get
18 into, and that is you notice some say "valid" and some
19 don't. But leaving that aside, these are the types of IDs
20 that, all of which are photo IDs that are acceptable under
21 this bill that was introduced, I believe, January 1st,
22 2013, SB 1256.

23 Q Did the photo ID requirement of the 2013 law extend
24 to mail-in absentee ballots?

25 A It did not. So voters could, with an excuse -- and

Lichtman - direct

1116

1 they are pretty broad -- get an absentee ballot and send
2 it in without ever having a photo ID.

3 Q What would happen if a voter did not present an
4 authorized ID at the polls?

5 A Under this strict law you couldn't vote if you didn't
6 have acceptable ID, and that is both in terms of the list
7 and in terms of what the election official decides at the
8 polls. You then can walk away and decide, you know, all
9 right, I am not going to bother. Or, you are supposed to
10 be offered a provisional ballot. I think I indicated my
11 understanding of provisional ballot previously.

12 Q What were the implications?

13 A I didn't finish.

14 Q Pardon me.

15 A And then if you cast a provisional ballot you have
16 three days in which to return or have --

17 THE COURT: We have already had detailed testimony
18 from numerous witnesses about that.

19 THE WITNESS: I am done.

20 THE COURT: Thank you.

21 THE WITNESS: I don't know what other witnesses have
22 said.

23 THE COURT: All right.

24 BY MR. SPIVA:

25 Q Let me ask you to put table nine up on the screen.

Lichtman - direct

1117

1 What were the implications of elimination of the
2 affirmation -- I'm sorry --

3 A I think it says "affirmation of identity" there on
4 page nine.

5 Q Yes. What were the implications of elimination of
6 the affirmation of identity?

7 A Yes. One of the big issues that I have seen in
8 examining the materials in this case is the differing
9 percentages and real people. Virginia is a big state. It
10 has got, you know, five million registered voters. Close
11 to four million can turn out in an election. So a small
12 percentage can still mean a lot of real people. And
13 according to the source from the State that I have cited
14 here, you get about a .25 percent average in these
15 previous elections when you could use an affirmation of
16 identity, and while it seems kind of inconsequential, it
17 is not because of the large number of people voting in
18 Virginia. And in the 2008 general table, it shows that
19 9,382 voters taking advantage of this. And in 2010
20 general, a mid term, we get a lot of turnout it is:
21 5,536.

22 So we are talking about an option that affected
23 substantial numbers of voters in the presidential and
24 congressional year elections when that option was
25 available, no longer available under SB 1256.

Lichtman - direct

1118

1 Q What was the position of the governor's office with
2 respect to the enactment by the legislature of SB 1256?

3 A Yes, that is one of the more interesting features of
4 what was going on in this enactment. I didn't have this
5 e-mail series from the governor's office for my initial
6 report, but it is in my rebuttal report.

7 Q If we could put Plaintiffs' Exhibit 119. This is in
8 evidence, Your Honor.

9 THE COURT: All right.

10 BY MR. SPIVA:

11 Q Go ahead, Doctor.

12 A Yes, I was going to say the e-mail series indicates
13 that the governor and the governor's high level staff did
14 not see any need to change the 2012 law to move into a
15 strict voter photo ID law. And it is exactly the course
16 responsible for administering the election laws and
17 overseeing them. And e-mails from high level staffers in
18 the governor's office indicate specific reasons why they
19 had this opposition six months after everyone had affirmed
20 the 2012 law, including the submission to Justice to move
21 towards the new law. I think that is the first in the
22 series of --

23 Q Turn to the next page. You quoted this in the
24 rebuttal report, Dr. Lichtman.

25 A Yes. I can't quite see it. I can see it in my

Lichtman - direct

1119

1 report.

2 Q Is it easier if I had the rebuttal report pulled up
3 to the page where you cite this?

4 A Yes, this, I think this is, at least for my eyes, is
5 too small to see.

6 Q Can you put up Exhibit 215, which is Dr. Lichtman's
7 reply.

8 A Yes.

9 THE COURT: 119 and 215 are in evidence, Mr. Spiva?

10 MR. SPIVA: Yes, 215 is Dr. Lichtman's rebuttal
11 report, which is, along with all the other expert reports,
12 is in evidence.

13 THE COURT: Okay.

14 MR. SPIVA: 119 is --

15 THE COURT: All right.

16 MR. SPIVA: -- also stipulated, not objected to. I
17 guess maybe I should move to --

18 THE COURT: Any objection?

19 MR. FINBERG: Not to that exhibit.

20 THE COURT: It will be received.

21 BY MR. SPIVA:

22 Q And so then maybe we can maybe make it a little
23 larger, the one that begins, I'm trying to get some stats.

24 A Okay. So this is an e-mail on January 18, 2013. At
25 the beginning of the legislative session. It is from

Lichtman - direct

1120

1 Tucker Martin, Governor McDonnell's communications
2 director, a high-level staffer. And it was sent to six
3 other members of the governor's staff.

4 And what this e-mail demonstrates is that from the
5 perspective of the governor's staff they did not want to
6 get involved in what they call Republican's titan voter
7 restrictions. They saw moving to a photo voter ID law and
8 eliminating such regularly at hand IDs such as pay checks,
9 and utility bills as a tightening of voter restrictions,
10 and critically, they did not see any real issues under the
11 2012 law in a very high turnout presidential election year
12 of 2012. They specifically cite Governor McDonnell for
13 saying he believes "Virginia's system as currently
14 constructed has strong safeguards against any voter fraud.
15 And he supports it in its current form."

16 That goes to the heart of justification for changing
17 the law. Not only does it have safeguards presently in
18 the view of the Governor, it has strong safeguards. And
19 why should we tighten up voter restrictions when we don't
20 need to.

21 Q Was there a follow-up e-mail, if you can --

22 A There was.

23 Q -- go to that. If we can do the part, which is the
24 follow-up e-mail. Maybe down to the next page.

25 A The whole thing.

Lichtman - direct

1121

1 Q What does that e-mail show?

2 A It is a follow-up e-mail, and it makes reference to
3 what we have been talking about, the 2012 law, which the
4 Governor, the submissions to the Department of Justice,
5 the sponsor, Senator Obenshain, other Republican members
6 of the legislature, and all affirmed would protect the
7 integrity of the ballot, guard against fraud, but not
8 disenfranchise anyone. So following the expansion last
9 time to protect the integrity of the democratic process we
10 got the high turn out presidential year, this is the
11 critical sentence, "It was a successful test of our
12 system."

13 You weren't getting a whole lot of provisional
14 ballots being filed. And, again, this is critical. "The
15 system worked as designed to prevent voter fraud, and to
16 insure that registered voters were able to cast their
17 ballot and have their vote counted."

18 Again it reiterates that the current system has
19 strong safeguards against fraud. And is proven, not just
20 theoretical as might have been at the time of its passage,
21 whenever one was saying it would safeguard against voter
22 fraud and not disenfranchise anybody, but it has in
23 practice worked exactly as intended.

24 Q Did other officials in the Governor's office also
25 weigh in on that matter?

1 A Yes.

2 That is correct.

3 Q We may need to zoom back to the, if we can, maybe,
4 blow up a little bit. It starts at later down to where
5 the bates number is.

6 What did other officials in the Governor's office --
7 what significance did you find in how they weighed in?

8 A This is Lisa Hicks's comments, who is the Governor's
9 Secretary of Administration, very significantly a former
10 Deputy Attorney General, so she would be quite familiar
11 with voter ID laws and their implications given her former
12 position. And she indicates that any new laws and
13 regulations should be focused on the registration process.
14 Not upon any new requirements for voting at the polls. I
15 don't know what she had in mind on the registration
16 process, but it is clear from this that she didn't see any
17 need to change voter photo ID, which had nothing to do
18 with the point of registration. The voter photo ID would
19 only come into play when she would register and try to
20 vote.

21 Q What did Senator Obenshain do subsequent to this?

22 A Senator Obenshain went ahead and pushed through the
23 adoption of SB 1256, which was the strict photo voter
24 identification law. New law, not just amendment of the
25 old law.

Lichtman - direct

1123

1 Q Was it openly signed?

2 A It was ultimately signed by the Governor, although he
3 issued a statement very similar to what is in these
4 e-mails reaffirming that he thought the present system was
5 working.

6 Q What was your ultimate assessment of the
7 implications, as a historian, of these e-mails for the
8 issue of intent?

9 A I think it has direct bearing on the issue of intent.
10 Here you had the Governor's office, executive responsible
11 for overseeing and administering elections saying on a
12 substantive basis there is absolutely no need to change
13 the existing law. It safeguards against fraud. It
14 doesn't disenfranchise anyone. It has worked in a very
15 high turnout presidential election, there is no need for
16 change.

17 So, this raises the issue, you know, what is the
18 other motivation for Senator Obenshain and his allies in
19 the legislature for pushing this through? And I think we
20 saw in all of the previous analyzes that any measure that
21 potentially would limit African-American, or more
22 generally minority turn out relative to whites would
23 benefit Republicans within the State of Virginia.

24 Q In your research, issue of intent, do you typically
25 expect to see decision-makers openly express the

Lichtman - direct

1124

1 discriminatory intent behind the laws if there is
2 discriminatory intent to the laws they are passing?

3 A Quite the contrary.

4 Q Why not?

5 A First of all, politicians are sophisticated,
6 particularly in the modern era. And particularly in the
7 modern litigious post-Voting Rights era. They are highly
8 unlikely to express openly anything smacking of
9 discriminatory intent. This is particularly true in --
10 remember, this is when section V was still in force.
11 Section IV had not been invalidated yet by the court.
12 That didn't come until after the passage of SB 1256. And
13 one of the provisions of the Voting Rights Act that could
14 get a new law invalidated was that it was passed with
15 discriminatory intent. So certainly no politician in the
16 State of Virginia is going to risk having the law
17 invalidated by expressing open discriminatory intent.

18 THE COURT: Let me ask you a couple of quick
19 questions. Did this bill come out of committee on a
20 straight party line vote? Coming out of committee.

21 THE WITNESS: I am trying to remember. I think
22 everything was, including committee, was either straight
23 party line or very close to straight party line vote yes.

24 THE COURT: And the floor vote was a straight party
25 line vote?

Lichtman - direct

1125

1 THE WITNESS: Virtually straight. May have been one
2 or two strays, but virtually straight party line. Might
3 have been completely straight party line vote.

4 THE COURT: Now, I think we have heard testimony that
5 Obenshain's provision may have been added by a committee
6 to resolve the differences between the House and the
7 Senate bill. Am I correct on that?

8 THE WITNESS: I am not certain. Which provision are
9 we talking about?

10 THE COURT: The provision that added the voter ID.
11 The requirement of the voter ID.

12 THE WITNESS: My understanding, I could be wrong, but
13 my understanding is that that was in the initial version
14 of the bill.

15 THE COURT: I am sure you have read it closer than I
16 have. Go ahead.

17 BY MR. SPIVA:

18 Q Is there evidence of political non-substantive
19 motivation in the interpretation of SB 1256 by the State
20 Board of Elections?

21 A Yes. And this is important because there are two
22 pivot points here. One is obviously the introduction and
23 adoption of the law. The other is the construction of the
24 law the following year by the State Board of Elections,
25 which became an extremely political process.

Lichtman - direct

1126

1 Q How did that evolve?

2 A Well, again, that evolved in kind of a complex way.

3 The State Board of Elections had to draft regulations
4 as to what counted as a valid ID. Remember when we saw
5 the list, some said "valid," some simply listed the ID.

6 But, the Board, three-person board, had to decide
7 what was meant by "valid." And in particular, the issue
8 was accepting expired ID, particularly for the most common
9 forms of ID, that is, licenses, of course, passports. And
10 this also implicated student IDs as well.

11 That process began with the State Board of Elections.
12 I think I have something on this from a deposition. Can
13 you put it up from the reply report, page 35?

14 Q Before you hone in, could you direct us to what you
15 are referring to?

16 A Says, McClees testified and then there is something
17 from the deposition.

18 Q Now, if we could --

19 A Highlight that.

20 Q Yes.

21 A That will help.

22 So the Board originally makes the decision that we
23 are not going to invalidate IDs because of an elapsed
24 expiration. So if my -- driver's license.

25 THE COURT: I think some members of the Board already

Lichtman - direct

1127

1 discussed that. We have had a detailed discussion of that
2 by the person who drafted it.

3 THE WITNESS: Okay.

4 THE COURT: Okay.

5 THE WITNESS: I didn't know that.

6 THE COURT: I know you didn't. Go ahead.

7 THE WITNESS: I will be quick.

8 THE COURT: I already went to the next question.

9 Okay.

10 BY MR. SPIVA:

11 Q Let me ask you. Did you consider on, I guess page
12 five and six of your reply report statements by Charles
13 Judd, the former chair of the Republican -- sorry. Former
14 chair of the Board of Elections?

15 A I did. This is important because, very quickly -- I
16 don't know if it was covered already, Your Honor -- Judd
17 said there is a reason why we are going to allow expired
18 IDs, because we don't care whether a person is still
19 capable of driving or not. We just want to establish
20 identity. Expired ID can establish identity. This is
21 very important, Your Honor.

22 We don't have in Virginia data directly on how many
23 expired IDs, let's say, licenses expired. We had it in
24 North Carolina, though. Some of the experts defendants
25 brought in North Carolina, for example. There were many

Lichtman - direct

1128

1 hundreds of thousands of persons with expired, just
2 looking at DMV IDs. And they were very disproportionate
3 minorities. This is not just a technicality. This is a
4 decision that could affect the voting rights of hundreds
5 of thousands of individuals within Virginia. Also,
6 there's been data presented by the state that in one year,
7 more than 500,000 persons had their licenses suspended.
8 To get them renewed, you have to pay money.

9 MR. HEARNE: To the extent this witness is trying to
10 present his view of what evidence has been presented by
11 the Commonwealth, I think it is inaccurate, first off.
12 Secondly, if it is part of his opinion I don't mind him
13 saying that, but I don't think its certainly evidence or
14 an accurate statement.

15 THE COURT: I am only accepting it as a premise to
16 his ultimate expert conclusion. That is all I will say at
17 this point. Go ahead.

18 THE WITNESS: My point was this involves a lot of
19 people.

20 THE COURT: Okay.

21 BY MR. SPIVA:

22 Q What if the ID is so old the picture no longer
23 resembles the person? Did you review any testimony
24 concerning that?

25 A Yes. It is not in my report, but it is in deposition

Lichtman - direct

1129

1 testimony.

2 Q The deposition testimony of Mr. Alcorn?

3 A Yes. I just got that three days ago.

4 Q That deposition was just taken on Saturday, Your
5 Honor. That is why it wasn't available at the time of his
6 reply report.

7 MR. HEARNE: Your Honor, to the extent that this
8 witness is now going to be testifying about things that he
9 didn't --

10 THE COURT: I am not going to allow him to recite
11 portions of Mr. Alcorn's deposition. As we know, the
12 expert can rely upon that. But you cannot recite it in to
13 the record as substantive evidence. So that objection is
14 sustained.

15 MR. HEARNE: Right. And I would note also, Your
16 Honor, to the extent he is going to bring in new facts or,
17 something that wasn't the basis for his report, it was
18 something that didn't exist at the time of his report.

19 MR. SPIVA: That is because Mr. Alcorn wasn't made
20 available to depose until Saturday.

21 THE COURT: Go ahead.

22 BY MR. SPIVA:

23 Q I won't put up the quote, but did you rely upon and
24 consider once it was available to you the statements by
25 Mr. Alcorn in his deposition concerning expired or

Lichtman - direct

1130

1 out-of-date license?

2 A Yes. It confirmed the common sense that there is a
3 requirement for reasonable resemblance. So if your
4 license is 30 years old, you don't look like it any more,
5 you are not going to have it accepted.

6 THE COURT: All right.

7 Are we at a good point for a short recess?

8 MR. SPIVA: Yes.

9 THE COURT: We will take a ten or 15 minute recess. I
10 will come back -- how much longer do you think direct will
11 take? Five minutes?

12 MR. SPIVA: I think we have got some time, Your
13 Honor.

14 THE COURT: Okay. Hope springs eternal.

15 MR. SPIVA: I believe he will be the last witness
16 other than potentially Congressman Wittman, which is
17 another issue.

18 THE COURT: All right. Fine.

19 Take a ten minute recess.

20 (A recess was taken.)

21 (Krista Harding is now the court reporter.)

22 THE COURT: All right. We'll continue with the
23 direct examination.

24 MR. SPIVA: Thank you, Your Honor.

25 BY MR. SPIVA:

Lichtman - direct

1131

1 Q Dr. Lichtman, what happened after the Board made the
2 decision to accept expired IDs?

3 A Senator Obenshain, I think I've mentioned previously,
4 chief sponsor of 1256, wrote a letter to the Board asking
5 the Board to reconsider this decision saying that he saw
6 tension between elements of this rule and provisions of
7 state election law.

8 MR. SPIVA: Actually, if we can put up Plaintiffs'
9 Exhibit 132. Leave the one page for a second, and then go
10 to the second page.

11 BY MR. SPIVA:

12 Q Let me just ask you if this is the letter that you
13 considered?

14 A Yes.

15 Q Okay. And on Page 2, was there anything in
16 particular that you drew upon in coming to your -- in
17 considering -- in your analysis?

18 A He also talked about the need for the public comment
19 period in order to create rules for what is to be defined
20 as valid as opposed to not valid. But nowhere here on
21 this page, or on the previous page, does he directly
22 challenge the logic of Chairman Judd, a Republican, by the
23 way I believe, at the majority on the Board, that in terms
24 may not necessarily be using a license to drive or a
25 passport to travel, but for purposes of identity, valid,

Lichtman - direct

1132

1 could perfectly well be an expired ID.

2 And by the way, the legislature had also, and this is
3 in my report, discussed modeling it on Georgia, an older
4 ID law which accepted expired IDs.

5 MR. SPIVA: If you can bring up the last paragraph of
6 this.

7 BY MR. SPIVA:

8 Q You quoted this in your report, part of this
9 paragraph, Dr. Lichtman, is that right?

10 A That is correct.

11 Q Why did you quote that?

12 A Because this is urging the Board of Elections, this
13 is, you know, a leading politician within the legislature
14 to revisit the matter immediately. It to revisit its
15 already made decision to accept expired photo IDs, and to
16 open any subsequent action to public comment. It's also
17 interesting that he says "*whether or not the new rule can*
18 *be justified on policy grounds,*" indicating that perhaps
19 indeed the Board made a reasonable policy decision. And
20 he also is very strong here in talking about the need for
21 transparency. The need to get public involvement in this
22 decision.

23 MR. SPIVA: And we can take that down.

24 BY MR. SPIVA:

25 Q How did the Board respond, Dr. Lichtman?

Lichtman - direct

1133

1 A Well, the Board responded with a new rule that was
2 very tight which said we'll accept expired IDs, but not
3 IDs expired 30 days or more.

4 Q And did the Board follow this process and wait until
5 the end of the public comment period to make a final
6 decision?

7 A It's a little more complicated, but the answer is no.

8 Q And we've heard some testimony on this this morning,
9 but I want to basically know what you drew into your
10 analysis in terms of the process for defining a valid ID
11 in looking at the various documents.

12 A Yes. I had two -- well, I had a critical document in
13 my -- I think it's in my response report because I hadn't
14 seen it before then, and that was the deposition of
15 Mr. McClees who pointed out that well before the end of
16 the public comment period in August, a decision as a
17 result of this political intervention had already been
18 made. And that decision was to not accept IDs that had
19 been expired for more than a year.

20 In addition, Mr. McClees indicated that he is the one
21 to sift through and analyze and pass on the comments to
22 the Board. But the final Board vote was so close to the
23 end of the comment period that he had no opportunity to do
24 so. In other words, this push for transparency, and
25 public comment, was never real. The decision was made

Lichtman - direct

1134

1 before the public comments were in. And the public
2 comments were never seriously considered in the final
3 vote.

4 MR. HEARNE: Your Honor, --

5 THE COURT: Objection sustained.

6 He is drawing a conclusion that they were never
7 considered.

8 MR. HEARNE: That was my objection, Your Honor, as
9 well as that this is again going back over the testimony
10 the Court already noted.

11 THE COURT: Well, he's already gone over it, so
12 that's fine.

13 MR. SPIVA: I was trying to not have him put up the
14 testimony we've heard again.

15 THE COURT: That's fine. You handled it well. I'm
16 just not allowing the conclusion in.

17 MR. SPIVA: Okay. The testimony supports the
18 conclusion, Your Honor. That's the only reason why -- and
19 I was trying to kind of cut to the chase.

20 THE COURT: That's his opinion.

21 MR. SPIVA: All right.

22 BY MR. SPIVA:

23 Q And let me ask you, what conclusion did you -- did
24 your analysis lead you to in terms of the effectiveness of
25 Senator Obenshain's writing to the Board?

Lichtman - direct

1135

1 A Obviously, in my view, and based on the evidence I've
2 looked at, and also some other deposition evidence I
3 believe from Mr. Cortes that I just saw in the last couple
4 of days, also went through the same process that -- same
5 description as Mr. McClees, that the political
6 intervention of Senator Obenshain was critical in getting
7 the Board to switch from its initial decision, which not
8 only had accepted, but justified to changing that
9 decision, and -

10 THE COURT: Okay.

11 Go ahead.

12 A - and to not accepting certain kinds of expired IDs.

13 Q Did the regulations on the eliminations of IDs
14 expired more than one year apply to all IDs?

15 A They didn't. I think we see it, Your Honor, in that
16 list. Some were called valid and some were not called
17 valid. They only applied to IDs that had the term "valid"
18 attached to them. For example, they applied to licenses,
19 and other DMV IDs. They applied to passports, and they
20 applied to student IDs.

21 And so, you know, there was distinctions among the
22 kinds of IDs that a voter would have to understand were
23 acceptable or not acceptable.

24 Q I'd like to now turn to a slightly different topic -
25 the timing of the 2013 law. You had testified earlier

Lichtman - direct

1136

1 that the 2012 law was signed and precleared in 2012, May
2 and August of 2012, and followed by the 2013 law. In your
3 experience as a political historian, has any other state
4 enacted a voter ID law, and then replaced it with a
5 fundamentally different law in less than a year?

6 A I'm always reluctant to affirm a negative. But in my
7 experience, I've not seen that. Not that quickly and not
8 that fundamentally.

9 Q And could this substantive change be a result of
10 voter fraud in Virginia?

11 A No.

12 Q What type of voter fraud could potentially be
13 prevented through SB1256?

14 A Based on the Virginia law, the only type of voter
15 fraud that could plausibly be prevented is voter
16 impersonation at the polls. That doesn't apply to
17 absentee ballots.

18 Q And did you consider any deposition testimony by
19 Mr. Cortez or Mr. Alcorn regarding their assessment of --
20 as representatives respectively at the Department of
21 Elections and the SBE, of the type of voter fraud that
22 could be prevented by SB1256?

23 A Yes. This is what historians do. We reach our
24 conclusions, and when additional evidence becomes
25 available we look at it.

Lichtman - direct

1137

1 Q And what -- what role did that play in your analysis?

2 A Well, it confirmed what I had already concluded from
3 my analysis of SB1256, that only voter impersonation, not
4 other types of fraud, could be prevented by this
5 particular law in Virginia.

6 Q And did you assess, through the lens of a historian,
7 whether voter impersonation fraud could plausibly explain
8 the enactment of the 2013 law?

9 A I did.

10 Q And what did you find?

11 A I found that to the contrary it couldn't explain it.

12 Q What was that based on?

13 A That was based on two studies that appeared shortly
14 before the adoption of the 2013 law. The first one came
15 out in November of 2011 by the Republican National
16 Lawyer's Association. This is important because their
17 avowed purpose was kind of to debunk what they believed
18 was the Democratic myth that there's no voter fraud. And
19 they looked at both charges and convictions, and they
20 found, I think, over a broad period of time, going back to
21 2000 to 2010, no instances of voter impersonation in
22 Virginia.

23 And nationally, looking at 19 states with no
24 requirements whatsoever for ID at the poll, like Maryland
25 where you just walk in and vote, there were something like

Lichtman - direct

1138

1 five cases of voter impersonation in all of those states
2 out of hundreds of millions of ballots cast. Then more
3 shortly before enactment of SB1256 in August of 2012, in
4 this critical period, in fact, between passage of the 2012
5 law and passage of the 2013 laws, pivotal period, an even
6 more ambitious study came out by News 21, a national
7 reporting project made up of 11 universities.

8 And it went beyond the Republican National Lawyer's
9 Association. It looked at allegations as well as charges.

10 THE COURT: In Virginia?

11 DR. LICHTMAN: Did every state. And it did the State
12 of Virginia, and it found not a single case in Virginia.
13 And it also went back to 2000, covering a very broad swath
14 of time. You know, huge numbers of ballots being cast.

15 THE COURT: And there's never been an allegation of
16 voter fraud in Virginia?

17 DR. LICHTMAN: I have not found an allegation that is
18 specific. In other words, you get them. When I was
19 reading through the transcripts of the General Assembly, I
20 found a couple of instances where a member would provide
21 kind of an antidote. You know, someone told me that.
22 Someone came to the polls and then ran. There were two or
23 three of those antidotes. No names were named, so it
24 wasn't an allegation that anyone could check, obviously.

25 And, you know, it was the kind of story that you

Lichtman - direct

1139

1 often hear, but it's totally unproven. So beyond that, I
2 have not seen, looking at all of these studies, and
3 reading the testimony in the deposition of Mr. Cortes and
4 Mr. Alcorn, who also could not recall -- I'm not sure if
5 they were specifically asked allegations. They talked
6 about cases. They could not recall any cases.

7 So in terms of a checkable, credible, named
8 allegation of voter impersonation, I have not seen one in
9 Virginia, and there is not one in either of these very
10 large studies, including the News 21 study that looked not
11 only at charges and convictions, but any allegations that
12 I could find in the press.

13 THE COURT: Okay.

14 BY MR. SPIVA:

15 Q Is it possible that there were no allegations or
16 confirmations of impersonation voter fraud in Virginia
17 because such fraud is hard to detect?

18 A You hear that argument often, and the answer, for a
19 couple of reasons, is no.

20 Q And can you cite studies of academic studies and
21 their findings?

22 A Yes. I'm not going to go through all of the academic
23 studies, but there are number of academic studies, Your
24 Honor, a couple of them documented in my report, that
25 don't depend upon allegations that use different

Lichtman - direct

1140

1 methodologies.

2 Let me give you one example. It's a study by M.V.
3 Hood, III and Charles Bullock, III. He's an authority
4 that is actually cited by experts for the defendants. And
5 this study looked at --

6 THE COURT: Can you kind of abbreviate it a little
7 bit, please.

8 DR. LICHTMAN: Sure.

9 It looked at the issue of dead people -- or people
10 voting in the name of dead people. The most common
11 allegation you can find. And it found in the State of
12 Georgia, out of more than 2 million ballots cast, no
13 fraudulent votes were cast in the name of dead people.

14 And there are other studies that don't depend on
15 allegations that come to the same conclusion.

16 THE COURT: Thank you.

17 DR. LICHTMAN: Yes.

18 BY MR. SPIVA:

19 Q And, Dr. Lichtman, can you cite an example of a
20 postelection scrutiny of voter fraud that you were
21 actually involved in?

22 A I was, believe it or not. In 1994, the Democrat,
23 Parris Glendening, won a very close gubernatorial election
24 in my home state of Maryland. The results were challenged
25 by his opponent, Ellen Sauerbrey. And she charged

Lichtman - direct

1141

1 election fraud. A variety of charges. The most prominent
2 was voting the dead, or voting from addresses that don't
3 exist. Things like that. Some of which involved directly
4 voter impersonation.

5 I was hired by a very respected long-time Attorney
6 General then, Joe Curran. And Curran said to me, *"If*
7 *there's voter fraud going on in my state, I want to know*
8 *about it. I want you to check out that every allegation*
9 *that Ms. Sauerbrey has made."*

10 We checked them all and found not a single instance
11 of voter fraud. We found mistakes, which you always do.

12 THE COURT: Okay.

13 A And the case went to trial, by the way.

14 And Judge Thieme, in the District Court, said, *"Hey,*
15 *I voted for Ms. Sauerbrey, but there's no case here."* And
16 he dismissed it.

17 Q Did you consider what the proponents of SB1256 cited
18 as justification, a video involving a Democratic
19 operative, Patrick Moran?

20 A I did.

21 Q And did this video provide a credible basis for the
22 new photo ID law?

23 A I think just the opposite.

24 Q Why do you say that?

25 A I think this video, though it showed a lot of foolish

Lichtman - direct

1142

1 talk by Patrick Moran, showed just how difficult, if not
2 impossible, it is, even under the old law, which was
3 confirmed by the Governor well after he knew about the --
4 you know, at least the Moran video was well publicized
5 before that.

6 And here is why: First of all, even with utility
7 bills, and they said, you know, it would be much harder
8 with things like bank statements, even with a utility
9 bill, you have to have the following: Number one, you
10 have to find a forger. You have to find someone willing
11 to engage in the crime of forgery and risk prosecution.
12 Cast a vote.

13 Two. You have to find targets. You have to find
14 people in whose name you can vote. And you have to be
15 sure they haven't voted already. And as the video
16 indicated, you can't call them and ask them because you'd
17 then be alerted to the scheme.

18 Three. You have to find people willing to cast a
19 single vote to be convicted, to be prosecuted, to be sent
20 to prison for several years. In addition, you had to make
21 sure that the person would not be recognized as not the
22 person he is impersonating.

23 And I turn to a respected survey of the electorate.
24 And that survey found in Virginia, specifically, 13.1% of
25 voters knew the person who checked them in. That's one

Lichtman - direct

1143

1 out of seven or eight. So you're risking a one out of
2 seven or eight chance to go to prison in order to cast one
3 vote. That's why, in the end, even someone as foolish as
4 Moran basically said, look, you're better off spending
5 your time and your energy and your efforts getting out the
6 vote.

7 This video, to me, as an expert in this field, shows
8 even under the old law, it's implausible, if not
9 impossible, to orchestrate voter impersonation.

10 Q And is that sustained by other findings, for
11 instance, by the United States Election Commission?

12 A Yes. The United States Election Commission addressed
13 this issue of types of voter fraud. And it concluded that
14 voter impersonation was certainly among the least likely
15 because the risk reward was terrible. That is, to cast
16 one vote, you're creating such a risk of being -- going to
17 prison, being severely punished, if in fact there was --
18 and we don't know of anyone, if there was anyone in the
19 State of Virginia who wanted to vote in someone else's
20 name or arrange voter fraud. A much more efficient and
21 much safer way is through absentee ballots, which don't
22 require any kind of identification, either under the old
23 law or under SB1256.

24 Q Did you study the alleged examples of voter fraud in
25 the defendants' proposed findings of fact?

1 A I did.

2 Q And what did you conclude about that?

3 A Well, first of all, what I found was very interesting
4 was the time period. It covered 50 years, billions of
5 ballots were cast, and a couple of things. One, the last
6 example, even if you take it at face value, which you can,
7 is in 2005. There were no examples from the last 11
8 years.

9 So for you to objectively look at it, you would
10 conclude maybe a decade ago, and more, there were problems
11 with voter fraud, but no longer. No examples of any kind
12 from Virginia. Not of any kind of fraud, much less a
13 voter impersonation. No credible examples of voter
14 impersonation anywhere.

15 And for the most part, it relied on newspaper
16 articles. And even when you looked at citations that
17 weren't newspaper articles, like the Carter-Baker
18 Commission Report, when you actually looked at what the
19 underlying source was, particularly for this very
20 spectacular allegation of, you know, 181,000, I think it
21 was noncitizens on the voting rolls, the source was a
22 Chicago Tribune Newspaper article. And sometimes it
23 sources to things that doesn't have any underlying
24 sources.

25 Q Let me -- how many allegations of voter fraud did the

Lichtman - direct

1145

1 findings cite specifically to Virginia over this more than
2 50-year period?

3 A None of any kind, much less voter impersonation. Not
4 even newspaper cites.

5 Q Let me shift gears. Did you make -- also make
6 findings relative to the disparate impact on
7 African-American voter opportunities relative to white
8 opportunities under SB1256?

9 A Yes. That's one of the things the Arlington Heights
10 guidelines and basic historical methodology would have you
11 do.

12 Q And were these findings based on information
13 available at the time of adoption of SB1256?

14 A That is correct.

15 Q And what -- at the time of the adoption of SB1256,
16 were photo ID laws the subject of controversy?

17 A To put it mildly. It was one of the most hotly
18 debated controversial issues. A whole voters march in
19 commemoration of the Selma March. It was launched in
20 Alabama. It was the subject of debate in the press.
21 There had been court cases. A couple of laws in
22 Pennsylvania and Texas were blocked.

23 So, yes, any politician was well aware -- had to be
24 well aware of these controversies. As I say, politicians
25 live and die on these kinds of things.

Lichtman - direct

1146

1 Q Were there studies available at the time of the
2 adopting of SB1256 documenting racial disparities in the
3 possession of voter photo IDs?

4 A Oh, yes.

5 Q And was the Virginia General Assembly made aware of
6 charges, at least, that voter photo ID laws discriminated
7 against minority voters?

8 A Yes, they were.

9 MR. HEARNE: Your Honor, in term of whether the
10 General Assembly was made aware, he's not talking about
11 any specific article, any specific person. I think that's
12 speculative.

13 THE COURT: I'll sustain the form of the answer.
14 I'll take it to mean that there was information publicly
15 available.

16 DR. LICHTMAN: No, Your Honor.

17 THE COURT: Pardon?

18 DR. LICHTMAN: What I meant was we have evidence from
19 the Court -- the Cortes' deposition that he was working
20 for the Advancement Project at the time, and the
21 Advancement Project specifically communicated with members
22 of the General Assembly their findings that voter ID laws
23 discriminate.

24 THE COURT: They were advised of it.

25 All right. Let's move on.

Lichtman - direct

1147

1 BY MR. SPIVA:

2 Q And were there studies that were publically available
3 about the documented racial disparities in the possession
4 of the most commonly available forms of photo
5 identification?

6 A Yes. Of course there were well-known national
7 studies, but there were also Virginia-specific studies.

8 Q Okay.

9 MR. SPIVA: And can we put up Table 10. I believe
10 it's from Dr. Lichtman's initial report.

11 BY MR. SPIVA:

12 Q And first of all, can you cite to any such studies
13 you just mentioned, Dr. Lichtman?

14 A The Brennan Center had produced a number of studies
15 nationally, national studies, on disparate rates of
16 possession. And there were also studies available from
17 the survey of the Performance of American Elections.
18 Nationally, I've pulled out this study specifically for
19 Virginia, but they also had national results showing
20 similar patterns.

21 Q And can you explain what Table 10 shows?

22 A Yes. The survey of the performance of American
23 elections is a standard survey of registered voters. And
24 it samples individual states, as well as accumulates the
25 samples for the nation. And I have excerpted out that

Lichtman - direct

1148

1 part of the survey from 2008, so it was available.
2 There's always a gap, a time gap, between when these
3 surveys are done and when they were produced. So this was
4 available at the time of the adoption of SB1256.

5 And I've looked at whites and blacks in terms of
6 their possession -- and this question was asked in the
7 survey - that's why it's useful - of the two most common
8 forms of photo voter ID. And that is, Your Honor,
9 driver's licenses and U.S. passports. And as you can see,
10 this Virginia-specific data shows substantial racial
11 disparities in the possession of these two forms of
12 identification.

13 With respect to driver's licenses, 98.1% of whites
14 reported possessing them, and 84.6% of blacks. A
15 difference of 13.5 percentage points. With respect to
16 U.S. passports, 52.8% of whites reported possessing them,
17 compared to 19.2% of African-Americans. A difference of
18 33.6 percentage points.

19 And although the sample sizes are small for blacks,
20 the magnitude of the difference is great enough so that
21 these differences are statistically significance at the
22 very stringent .01 level in social science. That means
23 the likelihood of obtaining these differences merely by
24 chance or random processes are very, very small. So
25 social scientists could confidently conclude that these

1 differences within Virginia are real.

2 Q Did the information from Virginia enable you to
3 distinguish the direct impact on race, of racial
4 disparities, in driver's license and passport possession
5 as compared to the impact on party?

6 A Yes.

7 MR. SPIVA: If he can turn to Table 10, please.

8 A Yes. I was able to disentangle race and party.

9 MR. SPIVA: Can we turn to Table 11, please.

10 BY MR. SPIVA:

11 Q And if you can explain, Dr. Lichtman.

12 A Yeah. To try to hold party constant, it's not
13 perfect, but it's a pretty good measure, I looked at Obama
14 voters only to see if in fact there were racial
15 distinctions between whites and blacks among Democratic
16 voters in 2008, the year that this survey was taken. And
17 what I found was that there were comparable differences by
18 race, even among Obama voters. And that these differences
19 remained statistically significant at standard levels
20 within social science.

21 So the purpose of this was to see whether the effect
22 on the most common forms of ID operated by race or
23 directly by party. And this shows, even though the law is
24 obviously racially neutral on its face, that the political
25 derivations of the law stem from the impact of the law on

Lichtman - direct

1150

1 blacks versus whites. It's similar to the old poll tax.

2 And the old poll tax was racially neutral on its
3 face. It was justified by preventing voter fraud and
4 other measures. The players were reversed. It was the
5 Democrats in those days who benefited it. And they
6 benefited from it by impacting the votes of
7 African-Americans who were the base of the Republican
8 party. And that's who was targeted in the poll tax.

9 It gained political benefits for Democrats through
10 its impact on race, and that's similar to what's going on
11 here. I'm not comparing the two measures. I'm just
12 showing how they operate.

13 Q Was there also evidence available at the time of the
14 enactment of SB1256 regarding the disparities by age in
15 license and passport possession?

16 MR. SPIVA: And if we can turn to Table 12, please.

17 A Yes. Same survey also available. You get a little
18 bit different pattern with respect to age. Remember, age
19 was not nearly as significant a political determinate as
20 race.

21 With respect to the possession of passports, there
22 was no significant difference between the age groups. But
23 with possession of driver's licenses, not surprisingly,
24 there is a difference that is statistically significant.
25 And it is about 10.7 percentage points. The older

Lichtman - direct

1151

1 registered voters are more likely to possess driver's
2 licenses than the younger register voters.

3 Q Was there evidence at the time regarding racial
4 disparities in employer photo IDs?

5 A Yes. And that gets a little trickier because these
6 are people who say we have driver's licenses or say we
7 have passports.

8 When you're turning to employer IDs, Your Honor, we
9 know who's employed, but we don't know if they have
10 picture IDs. But we know a few things. And on balance,
11 it's not a huge racial difference there. We know that
12 African-Americans are much more likely to be unemployed
13 than whites. About double the unemployment rate. So
14 whites are much more likely to be employed, and even have
15 the option to obtain picture employment IDs.

16 We also know that by about three percentage points,
17 whites lead African-Americans in private employment. But
18 by about one or two percentage points, African-Americans
19 lead whites in government employment. Whites are more
20 likely to be in the private sector. African-Americans are
21 more likely to be in the government sector. But overall,
22 African-Americans are more likely to be unemployed. So
23 it's a close balance that probably tips towards whites,
24 but it's hard to say without knowing what employees have
25 IDs.

1 THE COURT: Next question.

2 Q Was there evidence at the time of the enactment of
3 SB1256 regarding racial disparities and student and
4 veteran's IDs?

5 A Yeah. Again, we don't know actually who has student
6 IDs. And student IDs have very stringent requirements
7 that universities may not have, like expiration dates.
8 But African-Americans are slightly more likely to be
9 enrolled in institutions of higher learning, and whites
10 are slightly more likely to be veterans. So these other
11 IDs, the balance are close. But on the most common forms
12 of ID, the balance is very wide towards whites as opposed
13 to blacks.

14 Q Let me shift again, did you do any assessment of the
15 budget that was included for SB1256 for voter education
16 and outreach?

17 A I did.

18 Q And what did you conclude regarding that?

19 A As I point out in my report, the budget was about
20 \$200,000 per year through 2017. We don't know what the
21 budget might be after that, or if there is going to be any
22 budget after that. For a big state like Virginia, where
23 you've got 5,000,000 plus registered voters, that's a
24 very, very minuscule budget.

25 THE COURT: What was that number again, Doctor?

Lichtman - direct

1153

1 DR. LICHTMAN: \$200,000 per year through 2017, Your
2 Honor.

3 THE COURT: Thank you, sir.

4 DR. LICHTMAN: And that's less than a nickel per
5 registered voter. And I read in the depositions of the
6 spokespersons for the Board and the Department of
7 Elections that they did not believe the budget was
8 adequate.

9 BY MR. SPIVA:

10 Q According to the latest information available to you,
11 how many free voter ID cards had Virginia issued?

12 A I think that's in my report.

13 THE COURT: During what time period?

14 MR. SPIVA: I've said the latest available to him,
15 but I think it is in his report.

16 DR. LICHTMAN: I have it. It's through September 24,
17 2015, Your Honor. And it was 4,622.

18 THE COURT: Okay. And that's through September 2014?

19 DR. LICHTMAN: No. September 2015.

20 THE COURT: Thank you, sir.

21 BY MR. SPIVA:

22 Q Dr. Lichtman, is there evidence from other states
23 relevant to the motivations behind the adoption of SB1256?

24 A Yes. An historian would look at the bigger picture
25 and the bigger context to see if Virginia is somehow not

Lichtman - direct

1154

1 consistent with national trends and what is going on in
2 other states.

3 MR. SPIVA: Can we put up Chart 11 from
4 Dr. Lichtman's initial report.

5 BY MR. SPIVA:

6 Q And what did you find?

7 A Yeah. This is exit polls looking at the white share
8 of voters from the voter turnout from the United States
9 election project. And it's the white component of voters.
10 And I don't have to dwell on this chart a great deal. But
11 the reason you see the sawtooth pattern is, obviously,
12 turnout differs in midterms and in presidential elections.
13 But whether you isolate the midterms going from '02 to '06
14 to '10 to '14, you can see the trend is downward. And the
15 same thing if you isolate the presidential elections.

16 In other words, the pattern of declining white
17 components of voters that we saw in Virginia is not an
18 atypical pattern. It is a typical pattern across the
19 United States over more than a decade of time.

20 MR. SPIVA: And if we can put up Table 13 from Page
21 37 of Dr. Lichtman's --

22 DR. LICHTMAN: If you can wipe out those lines. I
23 don't know how to do it. Maybe I can. Wait a minute.
24 No. It just makes it worse. There we go.

25 BY MR. SPIVA:

Lichtman - direct

1155

1 Q And how does Table 13 play into your analysis,

2 Dr. Lichtman?

3 A Well, Table 12 was the replication of the Virginia
4 data for turnout.

5 Q Did you want me to put that up?

6 A This is the replication of the Virginia data
7 nationwide from exit polls for voting. And you see almost
8 identical patterns nationwide that we saw in Virginia.
9 That is, the political base of the Republican Party is
10 white voters at 57%. Again, black voters only giving up
11 very minimal support to Republican candidates at about 7%.

12 That same, about, 50 percentage point gap between
13 white and black support for Republican candidates. And a
14 very close pattern as well for Hispanic, Asians, and
15 others that we see in Virginia. Maybe a little less of a
16 gap, but pretty close in the low 20s as opposed to the mid
17 and higher 20s. So what this shows is that Republicans
18 benefit from the votes of whites, and do not benefit from
19 the votes of blacks, Hispanics, Asians, and others,
20 nationwide.

21 MR. SPIVA: And if we could turn to Table 14, which I
22 believe is -- it's on Page 38 of his initial report.

23 BY MR. SPIVA:

24 Q And what does that show?

25 A We are now looking at, in light of our findings, are

Lichtman - direct

1156

1 these findings sustained? That is the declining pattern
2 of white turnout, the racial polarization? Has there been
3 a response to this, not just in Virginia, but nationwide,
4 in terms of Republican dominated governments adopting
5 photo voter ID laws?

6 And this table looks at the adoption of photo voter
7 ID laws after the 2008 presidential election. And there
8 are 14 states. Ten had straightforward Republican
9 control. In two of them, although there wasn't statewide
10 Republican control, Republicans were still able to adopt
11 photo ID laws by overriding the votes of -- veto, rather,
12 of a Democratic governor. So that's 12 of 14 either
13 straightforwardly adopted by Republicans, or adopted by
14 Republicans by overriding a Democratic veto.

15 In a 13th state, Mississippi, voters enacted the
16 voter photo ID law in a statewide referendum. That leaves
17 only one state, and that's the State of Rhode Island. A
18 very small state where a voter photo ID law was passed
19 when you had a Democratic state legislator and an
20 independent Governor.

21 But overwhelmingly since Barack Obama's victory in
22 2008, there has been a clear partisan pattern consistent
23 with the Virginia pattern of adoption voter photo ID laws.

24 THE COURT: Now, was the voter ID law in these 14
25 states identical, or at least similar, to the one in

Lichtman - direct

1157

1 Virginia?

2 DR. LICHTMAN: They are by no means identical. Some
3 are similar, some are not entirely similar. North
4 Carolina --

5 THE COURT: I don't need you to go on. I just wanted
6 to ask the question.

7 DR. LICHTMAN: Sure.

8 THE COURT: Next question.

9 MR. SPIVA: Yes, Your Honor.

10 BY MR. SPIVA:

11 Q Do the provisions of SB1256, and the interpretation
12 by the State Board of Elections, create issues regarding
13 voter confusion?

14 A I think they do. I think, you know, Your Honor was
15 asking me about the Virginia law compared to other state's
16 laws. I think the Virginia law is the most confusing of
17 all voter ID laws in the nation.

18 THE COURT: Why?

19 DR. LICHTMAN: I sketched this out in my report, and
20 raised the issues, and cite sources for this.

21 MR. SPIVA: Can we go to Page 40 of Dr. Lichtman's
22 report.

23 THE COURT: Are you talking about Plaintiffs' 212?

24 MR. SPIVA: Yes, Your Honor.

25 THE COURT: Page 40?

Lichtman - direct

1158

1 MR. SPIVA: Yes.

2 THE COURT: Okay. I'll take a look at it.

3 BY MR. SPIVA:

4 Q And what conclusions did you draw there,

5 Dr. Lichtman?

6 A Well, these questions were drawn out of e-mails from
7 election officials - and I cite them in my report - in the
8 State of Virginia who are even among themselves having
9 difficulty figuring out exactly what voter IDs count and
10 what don't.11 And the first couple derived from this whole issue of
12 certain kinds of IDs have to be valid, but other kinds of
13 IDs don't have to be valid. And so there's the question
14 of which IDs are unacceptable if they're expired. In this
15 case, expired by more than a year. So that also raises
16 for the voter the question what is the length of the
17 expiration period.18 There are issues with respect to revoked, suspended,
19 or canceled driver's licenses. As far as I know, the law
20 does not address that. Can a voter use a learner's
21 permit? What counts as a valid employer ID? Can an ID be
22 used if it does not contain an expiration date? Can
23 voters use a government issued ID that's not on the list
24 of authorized IDs? Must the voter's name on the ID match
25 the voter's name on the registration roles? Must the ID

Lichtman - direct

1159

1 contain an address? And must this address be current?

2 These aren't necessarily every issue raised by the
3 various distinctions among the IDs, but these are the
4 issues that I parsed out by looking at communications
5 among election officials themselves in Virginia.

6 Q And did you consider anything from the deposition
7 testimony of Mr. Alcorn who was the representative of the
8 State Board of Elections?

9 A I did. I recall that he made some comments about
10 voter confusion. I'd have to see it to --

11 MR. SPIVA: I guess I can put it up to refresh his
12 recollection, Your Honor?

13 THE COURT: Yes, sir.

14 MR. SPIVA: If we can put up Page 83 of Mr. Alcorn's
15 deposition.

16 BY MR. SPIVA:

17 Q If you can take a look at that, and see if it
18 refreshes your recollection, Dr. Lichtman.

19 A Yep. It shows a concrete example. I did recollect
20 this. A concrete example from the City of Richmond.
21 Right here, I guess.

22 And election officials demanded an additional ID,
23 even when they were presented with an acceptable ID. This
24 was errors made by election officials themselves. And the
25 deponent indicates that this was accurate as far as he can

Lichtman - direct

1160

1 tell. So this puts some flesh and blood on this issue of
2 confusion that can even affect election officials
3 themselves.

4 Q And why is voter confusion important?

5 A Because studies have shown that voter confusion can
6 be one of the most important influences of a voter photo
7 ID law in deterring people from showing up at the polls.
8 And I cite a specific study in my report from the State of
9 Texas that directly addresses this issue of, A, does voter
10 confusion deter voters. And, B, what is its magnitude.

11 And this is a study in 2014, a recent study, in
12 Congressional District 23. A majority Hispanic district.
13 Very competitive. One of the few competitive districts in
14 Texas. And it found that in looking at non-voters, 5.8%
15 gave as their principal reason for not voting the lack of
16 an acceptable ID. And 12.8 cited it as one reason for not
17 voting.

18 But the interesting thing that makes this study
19 informative was the researchers found that the great
20 majority of these non-voters who said they weren't voting
21 because they didn't have acceptable IDs, actually had
22 acceptable IDs but were simply confused about whether or
23 not their IDs would be acceptable, so didn't bother to
24 vote.

25 THE COURT: Okay. Next question.

Lichtman - direct

1161

1 Q Would this be especially important for minorities,
2 Dr. Lichtman?

3 A Absolutely. This study found that the impact was
4 much greater for Hispanic - this is a Hispanic district -
5 than it was for whites. And when you're dealing with
6 minorities, turning to African-American's, because that's
7 our focus, whose educational levels and educational
8 background and grasp of education is unfortunately lower
9 than that of whites, it's going to be a particular problem
10 for minorities, and also for Hispanics if they have
11 language issues.

12 THE COURT: Next question.

13 Q And did the study reach any conclusions regarding
14 whether the deterrent affect had any influence on the
15 outcome of the election?

16 A Well, they said it affected larger numbers of voters.
17 And while they couldn't prove it turned the election, they
18 said that it was possible that it did.

19 MR. SPIVA: Your Honor, I'm going to turn to another
20 topic, and I anticipate an objection, possibly even from
21 Your Honor. I just want to explain what --

22 THE COURT: Pardon me?

23 DR. LICHTMAN: Can I take a quick break?

24 THE COURT: Yes, sir.

25 DR. LICHTMAN: Thank you.

Lichtman - direct

1162

1 (Witness stood down from the witness stand.)

2 MR. SPIVA: Do you want me to do my explanation now,
3 or when he gets back?

4 THE COURT: I don't think the witness needs to be
5 here. You can go ahead and proceed without him.

6 MR. SPIVA: I have just a few questions I want to ask
7 him about what the legislature did with respect to long
8 lines. I'm not trying to litigate the long lines claim.

9 THE COURT: We've already been through that so many
10 times. You know, we only have a finite amount of time for
11 this case. And this gentleman's testimony is taking far
12 long than anybody could expect.

13 MR. SPIVA: Well, he's our key witness, Your Honor.

14 THE COURT: I know he is. Fine fellow. Bright as he
15 can be. But we don't get short answers to anything.

16 So I really think going back into the long lines --
17 we've already have had three, four, five witnesses that
18 have gone through it, what are you going to go into now?

19 MR. SPIVA: I'm not going to ask him about whether or
20 not there were long lines. It's what was the -- he's
21 looked at the specific legislative history, and is going
22 to testify that while the legislature, you know, enacted
23 the voter ID law purportedly in response to a problem of
24 voter fraud for which there was no proof, they -- there
25 were undisputed questions of long lines. And when

Lichtman - direct

1163

1 presented with solutions, potential solutions for those,
2 rejected all of those. I think it would take about a
3 minute.

4 THE COURT: I'm not going to allow that.

5 MR. SPIVA: Oaky. Just so it's clear on the record,
6 I mean, obviously, this is over our objection, Your Honor.

7 THE COURT: Understood.

8 MR. SPIVA: But we understand your ruling.

9 (Witness has returned to the witness stand.)

10 THE COURT: Okay, Mr. Spiva, go right ahead.

11 MR. SPIVA: Thank you, Your Honor.

12 BY MR. SPIVA:

13 Q Dr. Lichtman, I'm going to turn to a different topic.
14 Is there any relationship between voter ID laws and voter
15 confidence?

16 A If anything, there is a negative relationship. It
17 may seem counterintuitive, but there is either no
18 relationship or a negative relationship.

19 Q And were there any studies available at the time that
20 SB1256 was enacted that supports that conclusion?

21 A Yes. There was a study by Professor Ansolabehere,
22 which was available at the time, which looked at the
23 relationship between voter ID laws and voter confidence,
24 and found no relationship. I also used data available at
25 the time to do my own analysis.

Lichtman - direct

1164

1 MR. SPIVA: Can we put up Page 58 of his initial
2 report, please.

3 BY MR. SPIVA:

4 Q And first of all, Dr. Lichtman, does Page 58 reflect
5 either Dr. Ansolabehere's study or your own analysis?

6 A Well, this is Dr. Ansolabehere's conclusion where he
7 says, *"The use of photo ID requirements, bears little*
8 *correlation to the public's beliefs about the incidents of*
9 *fraud. The possible relation of such beliefs to*
10 *participation appears even more tenuous. This lack of*
11 *empirical support leads us to conclude that at least in*
12 *the context of current American election practices and*
13 *procedures, public perceptions do not provide a firm*
14 *justification for voter identification laws."*

15 And that's a study by Ansolabehere personally, and
16 the Harvard Law Review, from 2008. So it was available.

17 Q And you said that you had also conducted your own
18 analysis?

19 A Yes.

20 Q And what did you find?

21 A What I found was if you looked at confidence on the
22 part of voters, that the voters in their community,
23 county, city would be counted. And you compared states
24 with strict photo voter ID laws to other states, in seven
25 out of eight instances, including Virginia, voters were

Lichtman - direct

1165

1 less confident in the voter photo strict ID states than in
2 the rest of the states. And that seven out of eight was
3 strategically significant. I also posited reasons for
4 this. It wasn't just a random affect.

5 Q And what were those reasons?

6 A The reason I explained, in my view, was in these
7 states you're getting a constant drumbeat - rightly or
8 wrongly, it's politics - of voter fraud. The need to
9 protect the integrity of the ballot, big problems with
10 fraud. And that's going to affect public perceptions in
11 those states as compared to other states where that's not
12 made an issue. So it's kind of a self non-fulfilling
13 prophecy.

14 Q Did contemporary statements by legislators, and
15 others in Virginia, indicate a need to switch from the
16 2012 voter ID law to the 2013 law in order to promote
17 voter confidence in the integrity of the electoral system?

18 A They did. That was a major point of persuasion here
19 in Virginia, as it was in all the states that I've looked
20 at with respect to voter ID. This idea of public
21 confidence in elections is a very central argument.

22 Q Did legislators cite the report of the Carter-Baker
23 Commission on electoral reform to justify enactment of
24 SB1256?

25 A They did.

Lichtman - direct

1166

1 Q And are you familiar with the Carter-Baker
2 Commission?

3 A I'm extremely familiar. The Carter-Baker Commission
4 was housed at my institution, The American University. It
5 was directed by the, unfortunately, now late Robert
6 Pastor, who was my cousin by marriage. I sat in on
7 academic advisory meetings of the Carter-Baker Commission
8 and discussed the Commission extensively with Professor
9 Pastor.

10 Q And what did you learn?

11 A I learned that the Carter-Baker Commission, not
12 surprisingly, given that, you know, a very eminent
13 Republican in Secretary Baker and a very eminent Democrat
14 in President Carter, was a compromise. That Secretary
15 Baker wanted a recommendation for photo ID, and President
16 Carter wanted recommendations for expanding access to the
17 ballot. And that's why you have both of those elements in
18 the Carter-Baker Commission report.

19 And I also cited a later joint op-ed written by both
20 Baker and Carter, which indicated we both needed ballot
21 security, and at the same time doing what you can to open
22 access. So that's the nexus. And you couldn't pull apart
23 one from the other, because that's the very nature of the
24 compromise.

25 Q Did backers of SB1256 also cite the Georgia voter ID

Lichtman - direct

1167

1 legislation as a model?

2 A They did.

3 Q And did they follow this model?

4 A No. As we saw, we talked about with respect to
5 expirations, they did not follow the Georgia model. The
6 Georgia model is much simpler, much less confusing than
7 the model in the State of Virginia. They didn't totally
8 tear up the Georgia, but in fundamental ways that
9 critically affect people's voting, they departed from the
10 Georgia model. And I talked about that, I think, in my
11 initial report.

12 Q Did backers of SB1256 make the common sense argument
13 that it brings identification for voting in line with
14 photo ID requirements for such activities like receiving
15 Social Security, Medicare, Medicaid, et cetera?

16 A Yes. You often get that common sense requirement --
17 that common sense argument. And we got it here.

18 Q And what is your analysis of that?

19 A I'm not going to go through all the details of my
20 analysis, but I showed that none of those examples hold.
21 That you can get Social Security, you can get Medicare,
22 you can get Medicaid without having to have a photo ID.
23 In other words, not strict. And that you can get many,
24 many forms of prescriptions in the State of Virginia
25 without having a photo ID as well.

Lichtman - direct

1168

1 Q I'd like to now turn to your analysis of the Senate
2 Factors. And I think with respect to some of them you've
3 already discussed, but if you can just tell me I've
4 already discussed this so we can move on to the next one.

5 What is Senate Factor 1, and what did you find?

6 A We already discussed that. That's history of
7 discrimination.

8 Q Okay. And Senate Factor 2, is that the extent to
9 which voting, and the elections of the state or political
10 subdivisions, is racially polarized?

11 A Already discussed and laid out in my tables.

12 Q And Senate Factor 3 is the extent to which the state
13 or political subdivision has used unusually large election
14 districts, majority vote requirements, anti-single shot
15 provisions, or other voting practices or procedures that
16 may enhance the opportunity for discrimination against the
17 minority group.

18 A That we haven't discussed.

19 Q And have you looked at that?

20 A Yes. And what I found is on Page 61 of my report is
21 that Virginia was one of only 14 states that offered
22 voters neither early voting, nor no excuse absentee
23 balloting. That Virginia has one of the worst records in
24 the nation when it comes to the duration of waiting times
25 at the poll, both in the general election of 2008 and

Lichtman - direct

1169

1 2012. It was among the five states with the longest
2 waiting times at the polls. I mean, very significant for
3 voters. And that the waiting times at the polls --

4 Q Dr. Lichtman, I should tell you that while you were
5 out, His Honor said we should move on from the long lines
6 or waiting times. So if you can maybe, you know, focus on
7 the other part of your findings.

8 You made a finding with respect to long lines, I take
9 it?

10 A One more point. A study by the Center for American
11 Progress found that Virginia ranked sixth from the bottom
12 among all states in access to voting. This is a liberal
13 leaning think tank, you know, but they have a list of
14 objective criteria. And, you know, Democratic states also
15 get grades of a D or F.

16 MR. SPIVA: Let me ask you, Ms. Schultz, to put up
17 Table 18 on Page 50 of Dr. Lichtman's report.

18 BY MR. SPIVA:

19 Q And let me ask you, what is Senate Factor 5, and what
20 did you find?

21 A Senate Factor 5 is the extent to which members of the
22 minority group of the state bear the effects of
23 discrimination in areas such as education.

24 MR. SPIVA: I'm sorry. We can take the table down.
25 I got my notes mixed up.

Lichtman - direct

1170

1 A That was the table I referred to previously.

2 Q So going back to Senate Factor 5, if you can tell us
3 what that is and what you found.

4 A We've already discussed that. That's disparities in
5 such things as education, employment, health, and others.

6 Q Okay. And then Senate Factor 6, what is that, and
7 what did you find?

8 A Yeah. That's whether political campaigns have been
9 characterized by overt or subtle racial appeals. And I
10 found three recent examples of racial appeals, racial
11 slurs, or however you want to put it. One is pretty
12 well-known. And it's detailed specifically in my report
13 with quotations on Page 61. And that's in the 2006
14 campaign for U.S. Senate, Republican candidate, and former
15 Governor, George Allen, called a volunteer for Democrats
16 of east Indian descent, macaca, and kind of repeated this
17 slur.

18 I also found other examples. I found in Loudon
19 County five years later on Halloween of 2001, the
20 Republican Party of --

21 Q You said 2001. Did you mean 2011?

22 A I'm sorry, 2011. It's getting late. Circulated by
23 e-mail a photomontage showing President Barack Obama with
24 a bullet in his head. And Obama supporters as grotesque
25 zombie figures. This was even condemned by the Republican

Lichtman - direct

1171

1 Party. But even after that, and even after the macaca
2 incident in the run-up to the 2012 election, the
3 Republican Party of Mecklenburg, Virginia posted on its
4 Facebook, images of Obama as a witch doctor, a cave man,
5 and a thug.

6 MR. SPIVA: Can you put up Page 63 from
7 Dr. Lichtman's report.

8 BY MR. SPIVA:

9 Q Is this the image you were referring to from the
10 Loudon County --

11 A Yes. I couldn't find the image from Mecklenburg
12 County, but I did find the image from Loudon County. I
13 think it speaks for itself. I don't need to comment.

14 MR. SPIVA: We can take that down.

15 BY MR. SPIVA:

16 Q What is Senate Factor 7, and what did you find?

17 A The extent to which members of the minority group, in
18 this case we're looking at African-Americans, Your Honor,
19 have been elected to public office. And of course we know
20 that no African-American has been elected statewide since
21 Doug Wilder, which made headlines back in 1989. I don't
22 think there's even been much nomination by either party.
23 I don't know if the Democrats have nominated anyone
24 statewide. Republicans may have nominated one or two, but
25 no one has been elected.

Lichtman - direct

1172

1 And African-Americans are substantially
2 underrepresented in the General Assembly. They are about
3 13% of both the State House and the Senate, which is just
4 64% of their percentage in the citizen voting age
5 population. This is a shortfall of three State Senate
6 seats, and seven State House seats.

7 I also looked at data compiled by the American Bar
8 Association. They have a national database of judicial
9 diversities. And for the courts they looked at - it
10 wasn't Federal Courts, Your Honor - African-Americans
11 comprised 10.7% of judges. 56% of their citizen voting
12 age population. The equivalent of a shortfall of 15
13 judgeships. So certainly that Senate Factor applies.

14 Q And what is Senate Factor 8, and what did you find?

15 A The report says these last two Senate Factors are
16 still relevant, but not as relevant as the first seven,
17 but I still analyzed them. Factor 8 is whether there is a
18 significant lack of responsiveness on the part of elected
19 officials to the particularized needs of the minority
20 group.

21 And I mention here many, many years of advocacy by
22 the NAACP, and no response -- I don't think I can talk
23 about waiting times, but maybe in this context, the issue
24 of waiting times.

25 And another critical issue for African-Americans in

Lichtman - direct

1173

1 Virginia is the expansion of Medicaid. We saw the great
2 disparity between African-Americans and whites in
3 insurance coverage in health. And that includes all kinds
4 of health coverage. And African-Americans would
5 particularly benefit from Medicaid expansion.

6 I cite a study by the Kaiser Foundation which
7 indicates that of more than 500,000 uninsured Virginians
8 in 2011 who would be eligible for Medicaid expansion, 28%
9 are African-Americans. Much higher than the 19, or so,
10 percent of Virginia adults that are African-American.

11 And the Virginia General Assembly has consistently
12 blocked Medicaid expansion, which would have benefits for
13 African-Americans. And has been a particular point of
14 advocacy by African-American groups, not just in Virginia,
15 but across the nation, obviously.

16 MR. SPIVA: Would you please put up Table 19 on Page
17 65 of his initial report.

18 BY MR. SPIVA:

19 Q Did you find some relationship between the states
20 that had not expanded Medicaid under the Affordable Care
21 Act as of November 2015, and the adoption -- and those
22 that adopted voter photo ID laws?

23 A Yes. There is a remarkably strong correlation,
24 although the great majority of states don't have photo
25 voter ID laws. The great majority of states that have not

Lichtman - direct

1174

1 expanded Medicaid have, in fact, adopted photo voter ID
2 laws. So the same political dynamics that we see with
3 respect to Medicaid expansion, as indicated by this table,
4 also applies to the adopting of voter photo ID laws.

5 Q And what, finally, what is Senate Factor 9, and what
6 did you find?

7 A Whether the policy underlying the state or political
8 subdivision's use of such voting qualification,
9 prerequisite to voting, or standard practice or procedure
10 is tenuous. And I'm not going to repeat my discussion of
11 the rationales, which I think are contextual, and the lack
12 of voter fraud and the lack of relationship to voter
13 confidence.

14 Q I'd like to now turn your attention to the reports of
15 the defendants' experts, which you analyzed in your
16 rebuttal report. First, considering Dr. Owen's report.
17 Does the Owen report indicate that it is not appropriate
18 for a social scientist to analyze the intent behind
19 legislation?

20 A No. Quite to the contrary. And I found this very
21 interesting, because I hadn't seen it before. The Owen
22 report directly engages the issue of intent. It quotes an
23 authority, John Kingdon, on intent analysis, and offers an
24 alternative explanation to discriminatory intent.

25 Q And what is that explanation that Dr. Owen offers?

Lichtman - direct

1175

1 A The explanation that Dr. Owen offers is that the
2 adoption of photo voter ID law in Virginia was a response
3 to public opinion as opposed to a calculation of political
4 advantage on the part of decision-makers.

5 Q And is this explanation -- in offering this
6 explanation, does she follow standard methodology
7 according to historical practice, or the Arlington Heights
8 guideline?

9 A Not at all. It was a very abbreviated discussion of
10 this alternative explanation. She does not examine the
11 history or current manifestation of discrimination in
12 Virginia. She does not follow the sequence of events, or
13 the bigger political picture, related to the adoption of
14 SB1256. She does not examine the contemporary statements
15 of decision-makers. And so the whole extended analysis
16 that you would need to prove intent, although she engages
17 intent, is not present here.

18 Q Do you find other problems with her explanation?

19 A Yes, I found numerous other problems with her
20 explanation.

21 Q And what were those?

22 A First of all, to connect public opinion with policy,
23 she quotes an authority, John Kingdon, saying government
24 officials may make some rather general judgments about the
25 state of public opinion that affects policy agendas. Then

Lichtman - direct

1176

1 there's an ellipsis, and the quote goes on to say, "There
2 might be instances in which they feel the public at large
3 virtually directs them to pursue a course of action."

4 But the ellipses actually contains something very
5 important that's left out here. Kingdon says "at most
6 there might be instances."

7 And further, this is not in Dr. Owen's report, but it
8 is in Kingdon's book, he found in his case studies of
9 policy, general public opinion is important only in 26%.
10 It's a very small minority. He also points out, and this
11 is not present in her compilations from Dr. Kingdon, that
12 the issue is much more likely to prevent government
13 action, even in the few cases where it works, rather than
14 prompt government action. He says, quote, "Public opinion
15 may sometimes direct government action to do something,
16 but it more often constrains government from doing
17 something."

18 He concludes that, quote, "Public opinion acts more
19 as a constraint on what is possible, than as a promoter of
20 a particular item." Finally, he points out that the
21 public has to thrust the issue to make it part of the
22 agenda for vote-seeking politicians.

23 And Dr. Owen presents no evidence to demonstrate that
24 even a small number of Virginians are sufficiently
25 interested in the issue of photo voter ID. Remember,

Lichtman - direct

1177

1 there was non-photo law already existing to make it a
2 voting issue to make what we call a "*salient issue*". So
3 that's the conceptual problem. There are also very
4 particular problems with it.

5 Q She cites a Quinnipiac University poll. Are there
6 problems with her explanation in that regard?

7 A Yes. The only Virginia-specific evidence that
8 Dr. Owen cites in support of her proposition that it was
9 public opinion that promoted the adoption of SB1256, is a
10 Quinnipiac opinion poll issued on February 21, 2013. I
11 don't dispute that the poll shows strong public support
12 for photo voter ID, but this poll, the only specific
13 Virginia evidence she supplied, cannot possibly explain
14 SB1256 because it was issued after SB1256 was introduced,
15 and after SB1256 passed the House and passed the Senate in
16 Virginia.

17 THE COURT: Okay. Next question.

18 Q And are there other problems with Dr. Owen's
19 analysis?

20 A Yes. Sticking to the same poll, if the argument is
21 that it's public opinion that prompts response, there's
22 another issue equally strongly supported by the public,
23 and that is the automatic enfranchisement of former
24 felons. The numbers are almost identical, and yet the
25 same -- in the same legislative session that they adopted

Lichtman - direct

1178

1 SB1256, a Republican-dominated subcommittee killed by
2 voice vote SJ266, which was an amendment to restore voting
3 rights to just nonviolent former felons.

4 She also cites another survey, which is a SurveyUSA
5 Poll taken in April of 2013. I'm very familiar with this
6 poll because it was actually taken in the neighboring
7 state of North Carolina. But Dr. Owen cites it as
8 applicable to Virginia.

9 And, again, yes, it does show substantial public
10 support for photo ID, but there is some very important
11 other questions in this poll that Dr. Owen does not
12 disclose that contradict her theory on the enactment of
13 SB1256, and the substance of SB1256. Specifically, the
14 survey found that 74% of registered voters agreed that
15 "legislators should show evidence of significant problems,
16 such as real voter fraud, before they pass laws that make
17 voting more difficult."

18 The poll also found that 66% of registered voters,
19 quote, "Would allow persons to vote if they signed an
20 affidavit of identity under penalty of perjury." That's
21 what they could do before SB1256, but SB1256 eliminated
22 that. And again, I didn't conduct that poll.

23 Q I just want to clarify one thing. It was the 2012
24 law that eliminated the affirmation of identity?

25 A Right. But it was also not in the 2013 law. I might

Lichtman - direct

1179

1 have been a little unclear about that. That's right. It
2 existed before the 2012 law.

3 Q And finally with regard to Dr. Owen's analysis, does
4 she recognize whether public opinion, and discriminatory
5 intent, could potentially not contradict each other?

6 THE COURT: Could you repeat the question?

7 MR. SPIVA: Yes. I think it was probably an awful
8 question, Your Honor. Maybe I should just restate it
9 altogether.

10 THE COURT: If you would. Thank you.

11 BY MR. SPIVA:

12 Q Was there another problem with Dr. Owen's analysis?

13 A Yes. It's certainly possible that the legislators,
14 although it's not proven since the poll occurred after the
15 law, could have been sensitive to public opinion on this,
16 but that by no means contradicts discriminatory intent.
17 To again give the example of the Southern Manifesto. The
18 key document in opposition to *Brown v. Board of Education*,
19 and in support of the old Jim Crow south, it's certainly
20 possible that they were sensitive to the opinions of their
21 all white constituencies. But quite clearly, the Southern
22 Manifesto was based on discriminatory intent to maintain a
23 highly discriminatory system of segregation in Jim Crow.
24 Q Did you consider Dr. Owen's deposition testimony
25 regarding the example you just gave?

1 A Yes.

2 MR. SPIVA: Can we put up Page 30 of Dr. Owen's
3 deposition testimony.

4 BY MR. SPIVA:

5 Q And what -- what was your analysis of this testimony?

6 A This doesn't seem to be the right page.

7 MR. SPIVA: We may have the wrong page number. Why
8 don't I -- why don't we take that down.

9 A I remember it. I remember it. She was asked
10 actually about literacy tests. Literacy tests was
11 justified on the grounds of informed voters. Does that
12 mean it wasn't racially intentionally discriminatory? And
13 she responded by saying, well, if they said it, that was
14 it. But I am sure there were other motives involved.

15 In other words, recognizing you can have more than
16 one motive, including discriminatory intent behind a piece
17 of legislation, including legislation that is not racially
18 tinged on its face.

19 Q And did you read Dr. Owen's discussion of a Southern
20 Manifesto in her deposition?

21 A I did.

22 Q And what was your assessment?

23 A I think maybe we have can put up the --

24 Q Hopefully we have the right page number up. I
25 believe it's Page 28 of Dr. Owen's deposition.

Lichtman - direct

1181

1 A I mean, I remember it.

2 Q Does that help to refresh your recollection?

3 A This seems to be, again, about Virginia being -- it's
4 possible our page numbers don't line up.

5 MR. SPIVA: I have the wrong page number.

6 A But I was surprised to see it. I remember it very
7 well. I was surprised to see someone who teaches southern
8 history was unwilling to say that the Southern Manifesto
9 was clearly a racially intentionally discriminatory
10 document.

11 Q And was the Southern Manifesto framed in race neutral
12 terms?

13 A Yes. I mean, politicians who signed it were very
14 cleaver. They talked about States rights, and they talked
15 about the encroachment of the Courts. But they certainly
16 did not put into the Southern Manifesto any racially
17 discriminatory inflammatory language.

18 THE COURT: Next question.

19 Q Does Dr. Owen attempt to challenge your finding of
20 declining white turnout relative to minority turnout in
21 Virginia in recent years?

22 A Not directly. She didn't come up with any
23 alternative numbers of her own, but she did suggest I was
24 doing a kind of apples to oranges comparison.

25 Q And what is your assessment of that challenge?

Lichtman - direct

1182

1 A I don't think it was correct. As you saw, I was
2 comparing Senate elections to Senate elections. I
3 compared midterm to midterm, 2006 to 2014. I compared
4 governor elections to governor elections, 2009 to 2013.
5 And I compared presidential elections to presidential
6 elections.

7 Q Does Dr. Owen also claim that photo ID has limited
8 affect on turnout?

9 A Yes, she does.

10 Q And what does she say about that issue?

11 A Well, she primarily relies upon provisional ballots.
12 That is, she states there were fewer than 800 no ID
13 provisional ballots in 2014. And fewer than 450 no ID
14 provisional ballots in 2015.

15 Q Did you find problems with that analysis?

16 A Yeah. First of all, she didn't provide any source.
17 And then later, she interprets fewer than 800 as 494.
18 That's incorrect, as I point out from the documentation
19 directly on no ID provisional ballots from the Virginia
20 Department of Elections. The correct number is 773. So
21 she correctly described it once as fewer than 800, and
22 then incorrectly described it as 494. And I didn't find
23 her explanation that 494 is less than 800 particularly
24 persuasive for that big problem with her analysis.

25 But more broadly, number one, the percentages may be

Lichtman - direct

1183

1 small, but we're still talking about large numbers of
2 voters. And moreover, these statistics cover only a
3 midterm and an off year election. Both Dr. Owen and
4 another expert for defendants, Dr. Palazzolo, acknowledge
5 that the electorate is very different in midterm and off
6 year elections than it is in presidential years. More
7 engaged, more experience. The kind of voters who would be
8 less likely to be impacted by voter photo ID, as well as
9 much lower turnout.

10 So I did some examination comparing presidential and
11 midterm years in terms of no ID provisional ballot.

12 MR. SPIVA: Can we put up Table 1 from the reply
13 report, please, which is Plaintiffs' 215.

14 BY MR. SPIVA:

15 Q And what was your analysis? Can you explain what it
16 shows?

17 A In 2012, a high turnout presidential year, we did not
18 have a photo voter ID law in effect. We had a non-photo
19 voter ID law in effect.

20 In 2014, a much lower turnout election, we did have
21 SB1256. And despite the tail off in turnout, you had a
22 42% increase in no ID provisional ballots cast, indicating
23 the affects of moving from a non-photo to a photo ID. And
24 I specify this more precisely in the next table.

25 MR. SPIVA: Can we turn to -- not turn, but bring up

1 Table 2.

2 A Table 2 looks at, again, 2012 when you didn't have a
3 photo ID law in effect. And it looks at the no ID
4 provisional ballots as a percentage of provisional ballots
5 cast. There can be lots of other reasons besides not
6 having an acceptable ID why you might have to cast a
7 provisional ballot.

8 And the no ID provisional ballots in this
9 presidential year were just 5% of all provisional ballots.
10 But when you got to the non-presidential year, after the
11 adopting of SB1256, the number of all provisional ballots
12 drastically drops, whereas the number of no ID provisional
13 ballots rises. And so the no ID provisional ballots are
14 now 21.3% of all provisional ballots, or four times what
15 they were in 2012.

16 So if you got the same 11,000, or so, provisional
17 ballots in 2016, you might expect well over 2,000 no ID
18 provisional ballots the next time around.

19 Q Are there other problems with her analysis of the
20 turnout implications of voter photo ID?

21 A Yes. I think there's a much bigger problem than the
22 issues with provisional ballots, and that is it's
23 well-known that provisional ballots are only the tip of
24 the iceberg when it comes to the deterrent affects of voter
25 photo ID laws. Much more significant are those who don't

Lichtman - direct

1185

1 show up either because they don't have acceptable IDs, or
2 as we saw in the Texas case, that they don't believe they
3 have acceptable photo IDs. And we saw that could
4 implicate as many as 20,000 votes in just one
5 congressional district. It could implicate well over
6 100,000 votes in an entire state like Virginia, or even
7 more.

8 Q And is there another issue with Dr. Owen's analysis
9 of the provisional ballot corrected?

10 A Yes. She doesn't take into account the voters who
11 might just have walked away rather than cast a provisional
12 ballot. And rather than discussing the turnout
13 implications of photo voter ID using recent on-point
14 studies, like the Texas study, she cites older,
15 non-germane studies. She cites, for example, a finding
16 from an 8 to 10-year old study which shows that a lack of
17 voter ID accounted for only a small fraction of
18 non-voters. But that covered only the 2016 midterms and
19 the 2008 primaries. I didn't include a presidential.

20 And at the time of the 2006 midterms, only one state
21 had strict photo ID - Indiana. And at the time of the
22 2008 primaries, only two states had this.

23 Moreover, the studies -- the surveys on which she
24 relied way back then have now been updated. We now have
25 the 2014 post-SB1256 survey of the Performance of American

Lichtman - direct

1186

1 Elections which asks voters whether lack of identification
2 was a major or a minor factor in not voting. And
3 nationwide, 4.5% of non-voters, a very large percentage,
4 cited the lack of ID as a major factor for not voting.

5 The authors of the study projected this nationwide,
6 and found 3.1 million lost votes nationwide because
7 voters, rightly or wrongly, believe they didn't have the
8 acceptable ID. And this was with still a lot of states,
9 like Maryland, not having any ID laws at all.

10 The survey also found substantial racial disparities
11 between whites and blacks, with blacks much more likely to
12 cite a lack of ID as a reason for not voting than whites.
13 And it also found even greater disparities when you looked
14 at states with strict voter IDs.

15 There's also Virginia specific information. Small
16 sample. It's not statistically significant. But in
17 Virginia, 7.9% of non-voters cited the lack of an
18 acceptable ID as a major factor. Projected to all
19 non-voters, again, you're talking about very, very large
20 numbers. Even if you projected the lower 4.5% nationwide
21 finding, you'd be talking about very large numbers of
22 non-voters.

23 And so these updated studies show 3.1 million voters
24 nationwide, and we don't know how many in Virginia, but
25 it's many tens of thousands likely, and it may be over

Lichtman - direct

1187

1 100,000.

2 Q Does Dr. Owen also cite a Pew 2007 survey?

3 A She does.

4 Q Do you have issues with her analysis of this study?

5 A The Pew Study indicates that 98% of registered voters
6 told the Pew survey takers that they are confident that
7 they possess the IDs needed to vote in their state. But
8 that's nationwide. It doesn't limit it to those with
9 states with strict voter IDs.

10 THE COURT: What was that percentage again, Doctor?

11 DR. LICHTMAN: It's 98%.

12 A It was 98% in response to the Pew 2012 study before
13 the election - this is September of 2012 - were confident
14 they had the IDs needed to vote in their state. But at
15 that time, only four states had strict, and relatively
16 small states - Georgia, Indiana, Kansas, and Tennessee -
17 had strict photo identification requirements in effect.
18 So it doesn't tap into confidence in strict voter ID
19 states like Virginia would become later.

20 Moreover, again, while 2% might seem like a small
21 number, when you're talking about nearly five and a half
22 million registered voters in Virginia in 2012, that's
23 109,000 registered voters who, if you use the nationwide
24 projections, wouldn't be confident they had the necessary
25 IDs.

Lichtman - direct

1188

1 And I'm not going into the details. The Pew study
2 also showed considerable confusion among voters about the
3 identification requirements in their states. Not
4 surprising. Voters are not, you know, up on these fine
5 details on election administration.

6 Q Does Dr. Owen's report address other issues?

7 A Yes. She also addressed my findings of the
8 correlation since 2008 of the enactment of photo ID laws,
9 and the partisan control in the States showing that except
10 for, I think it was, one state, Rhode Island, it was
11 Republicans who pushed voter photo ID through those
12 states.

13 And she says first, quote, "*Support for Professor*
14 *Lichtman's logic requires that states in which Republicans*
15 *passed photo ID laws, have black populations roughly equal*
16 *to or greater than that of Virginia.*"

17 Q Is that claim accurate?

18 A Not of all.

19 Q Why not?

20 A First of all, I never made the claim. And second of
21 all, it doesn't make a lot of sense for two reasons.
22 Virginia is very high. I'm talking 19%. You can
23 certainly get political benefits, given the enormous
24 voting gap between blacks and whites. That black
25 percentage is less than 19%. In fact, you get political

Lichtman - direct

1189

1 benefits at every level of African-American population.

2 Moreover, in not every state are African-Americans
3 the primary minority. And so looking only at
4 African-Americans, like in Texas where the predominate
5 minority is Hispanics, is not necessarily accurate either.
6 So those are my three problems with it.

7 Q And what other claims did Dr. Owen make?

8 A She also says that most of the states adopting photo
9 ID laws lack motivation to suppress minority votes because
10 their presidential elections were not competitive.

11 Q And what is your response to that claim?

12 A I have two responses. Certainly having a competitive
13 presidential election might be one factor, but it's hard
14 to tell when a presidential election is going to be
15 competitive. For example, Indiana adopted its voter photo
16 ID law after the 2004 election where Bush won by a near
17 landslide, but four years later Barack Obama won in
18 Indiana.

19 In Pennsylvania in 2008, before they passed their
20 law, Obama won by 14 points. But Pennsylvania is
21 typically a swing state. And Republicans believed their
22 prospects in 2012 were sufficiently bright for State House
23 Republican leader, Mike Turzai, to say in June of 2012
24 that the State's new photo ID law, quote, "*Is going to*
25 *allow Governor Romney to win the State of Pennsylvania.*"

Lichtman - direct

1190

1 And of course I'm not going to go into this. I detail
2 lots of examples. Advantages accrue to lots of elections
3 other than presidential elections, including statewide,
4 State House, and congressional elections.

5 Q Let me ask you to -- does Dr. Owen address the issue
6 of increasing voter confidence as a justification for a
7 strict voter photo ID law in Virginia?

8 A She does. She says, you know, that there are
9 indications that the adoption of photo voter ID laws
10 increases confidence in elections; however, it's not
11 sourced. I couldn't find any source for that statement in
12 her report. And as we have seen evidenced from the
13 surveys of voters directly contradict that showing either
14 that there is no relationship, or for the reasons I
15 explained, the relationship goes the other way it turns
16 out.

17 Q And I believe you've already spoken about the survey
18 of Performance of American Election Survey, is that right?

19 A I have.

20 Q Okay. And does Dr. Owen cite studies of voter photo
21 ID and voter turnout?

22 A She does. She does attempt to demonstrate that the
23 affects of voter ID do not reduce voter turnout, but there
24 are serious problems with the study she cites.

25 Q And just briefly, what are those?

Lichtman - direct

1191

1 A Mostly, she relies on obsolete studies that do not
2 reflect the current reality. She cites five studies that
3 go back 2006, or farther. She cites only one out of all
4 her studies, a post-2006 study, a study in Georgia, which
5 does show in fact reduction in turnout. And she doesn't
6 get the number right. She says it shows that turnout was
7 depressed in Georgia by 16,642. But in fact, the authors
8 say the different was 24,692.

9 She also inaccurately quotes the authors as saying
10 that in Georgia, more African-Americans than whites had
11 the most common forms of voter ID. The authors never say
12 that. And the data from the survey of the Performance of
13 American Elections shows quite the contrary. It's on Page
14 26 of my report that African-Americans are 10 percentage
15 points less likely to possess driver's licenses in
16 Georgia, and 14 percentage points less likely to possess
17 U.S. passports in Georgia.

18 Q And are there recent relevant studies that you
19 haven't already discussed concerning this issue of the
20 affect on turnout of voter ID laws?

21 A There's a very well-known, and very highly publicized
22 study, that came out in 2014 by the General Accountability
23 Office of the United States Government. A very respected
24 nonpartisan arm of the government. And it looked at two
25 strict photo ID states - Kansas and Tennessee. And unlike

Lichtman - direct

1192

1 many studies, did comparison with other states.

2 And to cut to the chase, the study found that both
3 voter turnout was suppressed by the strict voter photo ID
4 laws in these two states, and was suppressed
5 disproportionately for African-Americans in both states.

6 Q And did Dr. Owen indicate any awareness of the study
7 in her deposition?

8 A Yes. I looked at her deposition, and she said she
9 was not aware of this study, which was very highly
10 publicized, even in the general public.

11 Q And does Dr. Owen also point to aggregate voter
12 turnout as an indicator of the affects of SB1256?

13 A She does.

14 Q And what's your response to that?

15 A I have a couple of responses. One, there are lots of
16 influences on aggregate voter turnout. So aggregate voter
17 turnout by itself will not isolate the affects of photo
18 voter ID law. And I cited lots of evidence that actually
19 did isolate its affect from the survey of Performance of
20 American Elections.

21 Moreover, looking at the two midterm elections from
22 2010 to 2014, aggregate turnout did drop in Virginia by
23 2.4 percentage points. Not an insignificant amount
24 despite the fact that there was no top of the ticket
25 election in 2010. And we know, of course, in 2014,

Lichtman - direct

1193

1 Virginia, had the most competitive Senate election in the
2 country.

3 Q Did Dr. Owen compare SB1256 with voter ID laws in
4 other states?

5 A She did. She looked at -- she had a table on Page 19
6 of her report looking at Virginia's law as compared to
7 five other states - Georgia, Indiana, Texas, South
8 Carolina and North Carolina - and said Virginia has more
9 acceptable IDs than other states with similar strict voter
10 requirements.

11 Q And what's your response to that?

12 A Well, first of all, the statement is not correct. As
13 I think I've already mentioned, I'm not sure I have,
14 neither North Carolina nor South Carolina have strict
15 voter photo ID laws. They both have reasonable impediment
16 requirements. So that's two of the five.

17 In Texas, we know that both the District Court, and I
18 was an expert witness in that case, and the Fifth Circuit
19 Court of Appeals found that their law violated Section
20 5 -- excuse me, violated Section 2 of the Voting Rights
21 Act.

22 With respect the final two comparisons, Indiana and
23 Georgia, there are also problems. The table indicates
24 that in Virginia, unlike these states, a person could use
25 a concealed carry. But Virginia's concealed carry does

Lichtman - direct

1194

1 not include a photograph. And the table also indicates
2 that Indiana does authorize expired IDs. In fact, it does
3 over a 2-year, not a 1-year, period. And Georgia, of
4 course, authorizes expired IDs.

5 THE COURT: Next question.

6 Q Does Dr. Owen's analysis, or table, address the issue
7 of voter confusion?

8 A It does not. And of course we know that's a very --

9 THE COURT: Next question.

10 Q Does Dr. Owen address your table showing racial
11 disparities in the possession of the most common forms of
12 photo ID?

13 A She does.

14 Q And what else -- and what does she address on these
15 disparities?

16 A She addresses it in two ways. First of all, she says
17 the sample size is too small. In fact, there's no such
18 thing as a too small sample size when you measure
19 statistical significance. Statistical significance, as I
20 explicitly stated in my report, is a function both of the
21 size of the sample and the magnitude of the difference.
22 And here, despite small samples for African-Americans, the
23 magnitude of the difference was great enough to have
24 statistical significance.

25 The second thing she does is do what's called an

1 "overlapping confidence interval analysis." Even though
2 the direct statistical tests show statistical
3 significance, she says there isn't statistical
4 significance because when you compute a 95% confidence
5 band around the black estimate and the white estimate, the
6 two confidence bands touch. However, you cannot use
7 overlapping confidence bands as a test of statistical
8 significance because you're using two separate
9 probabilities. And the probability can be very low that
10 there is -- that they're not statistically significant,
11 even when they overlap.

12 I cite three very powerful statistical authorities on
13 this. The Statistical Consulting Group at Cornell
14 University, and --

15 MR. HEARNE: Your Honor, I note that the witness is
16 basically reading his report into the record. The report
17 has been admitted.

18 THE COURT: I think -- I don't want to be impolite,
19 but we're going a little bit far afield here, okay? How
20 much longer do you think you're going to be this evening,
21 my friend?

22 MR. SPIVA: Well, I think he is addressing directly
23 the rebuttal report of Dr. Owen, and I -- you know, I
24 think probably another 20 minutes, Your Honor.

25 THE COURT: Then we'll recess until tomorrow morning.

1 MR. SPIVA: Okay. Thank you.

2 REPORTER'S CERTIFICATE

3 I, Krista Liscio Harding OCR, RMR, Notary
4 Public in and for the Commonwealth of Virginia at
large, and whose commission expires March 31, 2016,
5 Notary Registration Number 149462, do hereby certify
that the pages contained herein accurately reflect
the notes taken by me, to the best of my ability, in
6 the above-styled action.

7 Given under my hand this 10th day of March, 2016.

8 Krista L. Harding, RMR
Official Court Reporter

9 THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT

10 GILBERT FRANK HALASZ, RMR

11 OFFICIAL COURT REPORTER

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